Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, and DONALD L. ANDERSON,

Petitioners,

vs.

LARRY G. MASSANARI,
Acting Commissioner of Social Security,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when determining a "reasonable" attorney fee to be paid by the plaintiff to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b), a court may give no effect to the plaintiff's contract to compensate plaintiff's attorney in terms of a contingent fee taking into account the contingent nature of the fee even when the contingent fee requested is within the statutory limitation of 42 U.S.C. § 406(b) for an attorney fee not to exceed "25 percent of the total of the past-due benefits," even when it is a criminal offense for an attorney to charge a non-contingent fee, and even when the contingent fee sought is consistent with the prevailing market rate.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gisbrecht, Miller, Sandine, and Anderson respectfully petition this Court to issue a *writ of certiorari* to review the judgment and memorandum disposition of the United States Court of Appeals for the Ninth Circuit filed November 27, 2000 and ordered published, with modifications, on January 22, 2001. (App. 1-11.)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Gisbrecht v. Apfel*, 238 F.3d 1196 (9th Cir. 2000). (App. 1-11.) In an unpublished Order filed April 20, 2001, the U.S. Court of Appeals for the Ninth Circuit denied Petitioners' petition for rehearing. (App. 42-43.) The four separate underlying opinions of the United States District Court for the District of Oregon are not published. These opinions appear in the Appendix as follows: *Anderson v. Apfel*, No. CV-96-6311-HO (D. Or. Sept. 29, 1999) (App. 12-16); *Gisbrecht v. Apfel*, No. CV-98-0437-RE (D. Or. Apr. 14, 1999) (App. 17-22); *Miller v. Apfel*, No. CV-96-6164-AS (D. Or. Mar. 30, 1999) (App. 23-32); *Sandine v. Apfel*, No. CV-97-6197-ST (D. Or. June 18, 1999) (App. 33-41).

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered November 27, 2000 and modified for publication on January 22, 2001. (App. 1-11.) The

Court of Appeals denied a timely petition for rehearing on April 20, 2001. (App. 42-43.)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), is at issue in the instant appeal. It currently provides:

(b) Attorney fees

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(B) For purposes of this paragraph –

(i) the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title, and

(ii) amounts of past-due benefits shall be determined before any applicable reduction under section 1320a-6(a) of this title.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

42 U.S.C. § 406(b).

STATEMENT OF THE CASE

Petitioners seek review of a judgment of the U.S. Court of Appeals for the Ninth Circuit affirming the award of attorney fees pursuant to 42 U.S.C. § 406(b)(1) as calculated using the "lodestar" method instead of the "contingent fee" method. The basis for federal jurisdiction in the court of first instance, the U.S. District Court for the District of Oregon, was 42 U.S.C. § 405(g), following issuance, in each of the four now-consolidated cases, of a final administrative decision by the Commissioner of Social Security.

The following facts are material to consideration of the question presented:

All four of the Petitioners entered into mutually consensual employment agreements with their attorneys, Tim Wilborn and Ralph Wilborn. The attorneys agreed to

represent Petitioners in federal court in their claims for Social Security Disability Insurance Benefits under Title II of the Social Security Act. 42 U.S.C. § 423. Assuming successful representation, the Petitioners agreed to pay their attorneys 25% of the past-due benefits recovered. These agreements were contingent upon a finding of disability by the Social Security Administration or a federal court. (*See* App. 67-71, App. 72-76, App. 77-81, and App. 82-86 for the employment agreements with Anderson, Gisbrecht, Miller, and Sandine, respectively.)

After successfully representing each Petitioner in the Petitioner's underlying disability claim, their attorneys filed petitions for attorney fees under both the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(B), and the Social Security Act, 42 U.S.C. § 406(b)(1).[1]

In *Anderson*, Attorney Tim Wilborn sought a § 406(b) fee of $175.00 per hour, i.e., 7.8% of the claimant's retroactive benefit award. (App. 12.) In *Gisbrecht*, he sought 25% of the claimant's retroactive benefits award, i.e., $283.64 per hour. (App. 19.) In *Sandine*, he sought a fee award of 25% of the claimant's retroactive benefits award,

[1] An award of attorney fees under 42 U.S.C. § 406(b), for federal court representation is deducted from the claimant's past-due disability benefits, whereas an EAJA award is paid separately by the government. Where fees are awarded under both provisions, for the same services, the EAJA compensation serves as a reimbursement to the claimant for fees paid out of the retroactive disability award, and double recovery is prevented in that the attorney must refund the amount of the smaller fee to the claimant. *See* Pub. L. 99-80, § 3, 99 Stat. 186 (1985).

i.e., $266.94 per hour. (App. 33-34.) In *Miller*, the Petitioner's attorneys sought a joint fee award of 25% of the claimant's retroactive benefits award, i.e., $188.27 per hour. (App. 27, 30.)

Pursuant to the guidance offered in *Blum v. Stenson*, 465 U.S. 886 (1984), in support of their § 406(b) fee petitions, Petitioners' attorneys submitted evidence which established that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. Petitioners' attorneys submitted their own affidavits in which they averred, in part, that –

1. 100% of their law practice is devoted to representing Social Security claimants pursuant to contingent fee contracts;
2. it is a statutory requirement that federal court Social Security disability appeals are undertaken upon a contingent fee basis;
3. it is a nearly universal practice that federal court appeals of Social Security disability matters are undertaken pursuant to contingent fee contracts wherein the claimant agrees to pay attorney fees limited to 25% of the claimant's retroactive benefits, upon approval by the court; and
4. that their customary rate[2] for federal court representation in Social Security matters

[2] In February and April, 1999, Attorney Tim Wilborn averred that *his* "current federal court contract provides for a fee of $250.00 per hour or 25% of the claimant's past-due benefits. Thus my hourly rate currently is $250.00 per hour." (App. 50 – *Gisbrecht*; App. 64 – *Sandine*.) By July, 1999, Tim

> mirrors this practice, and thus that the "market rate" for federal court Social Security appeals is based on Social Security appeals "as a class" and that the market rate therefore is not an hourly rate but simply 25% of a given claimant's retroactive benefits.

(App. 44-47, 48-52, 53-57, 58-61, and 62-66.)

Petitioners also submitted affidavits from Attorneys Young, Brewer, and Schnaufer who attested that they had special expertise in Social Security disability matters, and that –

1. Attorneys for Social Security plaintiffs nearly always use fee contracts which provide for a contingent attorney fee equaling 25% of the claimant's retroactive benefits (App. 88, 89, 91);

2. for representation before the Social Security Administration (not the federal courts) most attorney fee contracts specify a maximum fee, typically $4,000.00, but that even with this upper limit, the typical recovery based on time expended for a successful case averages substantially above $250.00 per hour (App. 88, 89); and

3. there is no true "market rate" for attorney fees for plaintiffs for Social Security benefits because there is a statutory maximum on the amount of attorney fees a court may award

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Wilborn's contract provided for a fee of 25% of the claimant's past-due benefits. (App. 46 – *Anderson*.) All four contracts at issue were signed with the attorneys of the professional corporation, Ralph Wilborn & Etta L. Wilborn, P.C.

> and because almost all attorney fee agreements for legal services for Social Security disability insurance benefits plaintiffs specify that attorney fees will be the statutory maximum fees, *i.e.*, 25% of past due benefits payable (App. 88, 89-90, 91).

Petitioners also submitted an Oregon State Bar Economic Survey – the Flikirs report – which established that Oregon attorneys are compensated on winning contingent fee cases at an average hourly rate which more than makes up for non-payment on the losing contingent fee cases and that, therefore, the requested rates are "in line with" the rates of other attorneys in the relevant fora. (App. 93-97.)

Under the EAJA, each District Court awarded attorney fees at the artificial statutory hourly cap of $125.00 plus cost of living adjustments. In contrast, and purporting to base their § 406(b) fee award on the "lodestar" method, the District Courts in *Gisbrecht*, *Miller*, and *Sandine*, awarded § 406(b) fees to Attorney Tim Wilborn at $125.00 per hour. (App. 22, *Gisbrecht* – $125.00; App. 31, *Miller* – $125.00; App. 39, *Sandine* – $125.00.) In *Anderson*, the District Court awarded Attorney Tim Wilborn § 406(b) fees at $150.00 per hour. (App. 15.)

In *Miller*, the district court awarded § 406(b) fees to Attorney Ralph Wilborn at $150.00 per hour. (App. 31.)

None of the District Courts based their awards on market rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation; none enhanced the award based on

the contingent nature of the parties' employment agreements; and none gave any weight to the intentions of the parties as expressed in their employment agreements.

Moreover, instead of using data from the Flikirs report to derive rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," the District Courts which referred to the Flikirs report simply referred to the generic hourly billing rates attorneys were charging based on their years of practice. (App. 21, 38-39.)

The Flikirs report does not contain separate categories reporting the billing practices of attorneys providing Social Security representation. It does not separately report income or hourly rates of attorneys providing services which are "similar" to the services provided by federal court Social Security attorneys. Nor do its geographic "hourly billing method" data pertain to "the prevailing market rates" for "lawyers of reasonably comparable skill and reputation," as required by *Blum*. At best, one may use such "hourly billing" data to arrive at "market rates" in a two-step inquiry. *First*, after the requested fees in the instant cases are reduced to artificial hourly rates, these artificial rates can be compared to the Flikirs hourly rates to determine if they are "in line with" such rates. Using *Gisbrecht* as an example,[3] the requested fee of $7,091.50 (for 25.08 hours of representation)

[3] The argument applies equally to *Miller*, *Sandine*, and *Anderson*.

reduces to an artificial hourly rate of $282.75.[4] (App. 19.) Comparing this artificial hourly rate with those listed in the Flikirs report establishes that it is "in line with" those in the report.

As App. 94 establishes, the non-contingent overall hourly billing rates in Portland, the relevant forum, range from a low of $25.00 per hour to a high of $300.00 per hour. Although the requested rates in each of these four cases are contingent, they, nevertheless, are "in line with" the rates of other attorneys in Portland as required by *Blum*.

The *second* step of the inquiry requires determining whether the requested rates are in line with those prevailing in the community for *similar services of lawyers of reasonably comparable skill and reputation*. The Flikirs report does not address this issue. However, the affidavits and declaration of Petitioners' attorneys and Attorneys Young, Brewer and Schnaufer establish that, not only in Oregon, but throughout the nation, typical rates for *similar* services substantially exceed $250.00 per hour and are otherwise 25% of a claimant's retroactive benefits. Accordingly, this step of the inquiry must also be resolved in favor of Petitioners.

The data in the Flikirs report establish that in order for the District Courts to award § 406(b) fees at prevailing *market* rates, the courts *must* account for the contingent nature of Social Security cases as a class. The Flikirs report shows that Oregon attorneys spend 15% of their

[4] The district court incorrectly calculated the hourly rate in *Gisbrecht* at $283.64. (App. 19.)

time on contingent fee matters, but that they derive 16% of their income from "contingency billing." (App. 97.) For each 100 hours of attorney time, Oregon attorneys devote 15 hours to contingent fee matters, and they derive 16% of their income from contingent fee matters. This is equivalent to 16 hours of compensation for 15 hours of work. Thus, viewed globally, Oregon attorneys in contingent fee matters charge high enough attorney fees to make up for any risk of loss.

The data at page 98 of the Appendix establish that federal courts allowed (i.e., ruled that plaintiffs were entitled to benefits) only 6% of the Social Security disability and Supplemental Security Income disability cases in Fiscal Year 1997. The courts also remanded 42% of such cases to the agency for additional administrative proceedings. While the outcome of the remand proceedings is not stated, construing the data in the light least favorable to Petitioners' attorneys, 48% of the cases were decided favorably to plaintiffs.

Using data from *Gisbrecht* as an example, based on the District Court's awarding a lodestar of $125.00 per hour to Tim Wilborn before contingency is considered (App. 22), the Flikirs data establish that his hourly rate must be at least double that in order to bring his rate "in line with" the average Oregon attorney. Thus, the proffered evidence established that the requested rates by Petitioners' attorney are in line with those of lawyers of reasonably comparable skill, experience, and reputation as required by *Blum*.

REASONS FOR GRANTING THE WRIT: ARGUMENT

I. Introduction: The Circuits Are In Conflict Regarding Whether The Lodestar Or Contingent Fee Method Is Used To Calculate Attorney Fees As A Part of A Judgment Awarding A Plaintiff Benefits Under Title II Of The Social Security Act.

Benefits for individuals under Title II of the Social Security Act include Disability Insurance Benefits. 42 U.S.C. § 423. Section 206 of the Social Security Act, 42 U.S.C. § 406, provides for two basic kinds of fees for representing a claimant for Title II benefits that the *claimant* pays: fees for representing a claimant during administrative proceedings, *see* 42 U.S.C. § 406(a), and attorney fees for representing a plaintiff in federal court, *see* 42 U.S.C. § 406(b). This petition concerns the latter kind of fees, i.e., attorney fees that a court may award from the plaintiff's past-due Title II benefits whenever the plaintiff receives such benefits by virtue of the court's judgment. 42 U.S.C. § 406(b). This petition presents the issue of how a court calculates the amount of such attorney fees under 42 U.S.C. § 406(b).

Section 406(b) requires a contingent fee agreement; it prohibits an attorney from charging a plaintiff a non-contingent attorney fee. The central question presented in this case is whether the "lodestar" method or the "contingent fee" method governs when a court determines a "reasonable" attorney fee to be paid *by the plaintiff* to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b) when, as is always the case, the underlying agreement between the plaintiff and plaintiff's attorney is to compensate plaintiff's attorney in terms of a contingent fee. The question presented also concerns the extent to which a court

must give effect to the plaintiff's contract with plaintiff's attorney to pay a contingent fee reflecting the contingent nature of the fee.

The lodestar method starts by multiplying the reasonable hours expended by a reasonable hourly rate: this product is the lodestar. The lodestar then may or may not be adjusted upwards or downwards according to several factors, one of which may be the contingent nature of the fee. In contrast, the contingent fee method starts by ascertaining the amount of attorney fees owed pursuant to the contingent fee agreement between the plaintiff and plaintiff's attorney and then verifying that this amount is reasonable.

In determining an award of "reasonable" attorney fees under 42 U.S.C. § 406(b)(1), the United States Courts of Appeals are split between following the lodestar method borrowed from federal fee-shifting jurisprudence and the contingent fee method reflecting a common practice of the private marketplace for legal services. The Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits use the lodestar method. *See Coup v. Heckler*, 834 F.2d 313 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324 (4th Cir. 1989); *Brown v. Sullivan*, 917 F.2d 189 (5th Cir. 1990); *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989); *Gisbrecht v. Apfel*, 238 F.3d 1196 (9th Cir. 2000); *Hubbard v. Shalala*, 12 F.3d 946 (10th Cir. 1993); *Kay v. Apfel*, 176 F.3d 1322 (11th Cir. 1999). In contrast, the Second, Sixth, and Seventh Circuits utilize the contingent fee method. *See Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990) (*Wells II*); *Rodriquez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (*en banc*); *McGuire v. Sullivan*,

873 F.2d 974 (7th Cir. 1989).[5] The Court should grant the petition for a writ of certiorari to resolve the split between the Circuits and recognize that the contingent fee method is fully consistent with the text of 42 U.S.C. § 406(b).[6] *Cf. Hopkins v. Cohen*, 390 U.S. 530 (1968) (resolving Circuit conflict regarding the scope of past-due benefits mentioned in 42 U.S.C. § 406(b)(1)).

The Court should also grant the petition because the question presented is an important federal question. The Social Security Act is a federal program, national in scope, and remedial in purpose; there is a compelling need for uniformity in the methodology by which "reasonable" attorney fees are determined under 42 U.S.C. § 406(b)(1).

Further, since 42 U.S.C. § 406(b) prohibits an attorney from charging a plaintiff a non-contingent fee, the lodestar method when not enhanced to reflect the contingent

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[5] The First Circuit appears not to have formally adopted either approach. However, interpreting the First Circuit's holding in *Ramos Colon v. Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988), that "the determination of a reasonable attorney's fee rests within the sound discretion of the district court," a district court in the First Circuit adopted the contingent fee method employed by the Second and Seventh Circuits. *See Lombardo v. Secretary of Health and Human Servs.*, 888 F. Supp. 209, 210-12 (D. Mass. 1994).

[6] Because it is largely if not entirely discretionary under the lodestar method whether to enhance the lodestar to take into account the contingent nature of the fee, *see, e.g., Gisbrecht*, 238 F.3d at 1198-1200, no Circuit has disputed that there is a substantive difference between the lodestar method and the contingent fee method.

nature of the fee, necessarily forces the attorney to internalize the risk of loss. This result, essentially requiring attorneys to work pro bono, serves as a disincentive for qualified counsel to represent plaintiffs for Title II benefits. In any case, because the myriad protections of the plaintiff seeking Title II benefits are so strong relative to the protections of claimants seeking Title II and Title XVI benefits via administrative proceedings and relative to the plaintiffs seeking Title XVI benefits, as matters of Congressional intent and sound policy, effect should be given to the terms of a plaintiff's promise to plaintiff's attorney to pay attorney fees as a percentage of past-due Title II benefits received as a result of a court's judgment.

II. Respecting A Private Plaintiff's Agreement To Pay Attorney Fees Pursuant To The Terms Of A Contingent Fee Agreement Is Fully Consistent With 42 U.S.C. § 406(b).

A. 42 U.S.C. § 406(b) Prohibits An Attorney From Charging A Non-Contingent Fee.

The plain language of § 406(b)(1) mandates that "no other fee may be payable or certified for payment for such representation except as provided in this paragraph." 42 U.S.C. § 406(b). In other words, the statute requires that any attorney fee paid from Title II benefits for representation of a plaintiff in federal court be contingent upon a judgment favorable to the plaintiff and also that the judgment result in the payment of past-due benefits. Thus, for example, an attorney may not charge a plaintiff for Title II benefits any attorney fee if judgment is entered for the Commissioner. By law, a losing plaintiff

for Title II benefits owes his or her attorney no attorney fee.

The statutory prohibition on charging a plaintiff for Title II benefits a non-contingent attorney fee has teeth:

> (2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

42 U.S.C. § 406(b)(2). Congress has criminalized charging a plaintiff for Title II benefits a non-contingent fee.

Considering just this one fact – the criminalization of charging a Title II plaintiff a non-contingent attorney fee – a court should hesitate before giving no effect to a plaintiff's contract with plaintiff's attorney to pay plaintiff's attorney in terms of a percentage of the recovery of past-due Title II benefits. It would be anomalous for Congress to require an attorney to charge a contingent fee yet prohibit that same attorney from receiving a fee that reflected the contingent nature of the fee.

Legislative history establishes that Congress was well aware of the use of contingent fee agreements in federal court cases involving Title II benefits:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court

> actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins the case.

S. Rep. No. 404, 89th Cong., 1st Sess. U.S.C.C.A.N. 305, 2062 (1965). To remedy the potential for such abuse, however, Congress chose not to prohibit contingent fee agreements, but in fact to require them. As the Second Circuit commented in *Wells II*, the statute "seeks only to regulate the contingent fees favorably to the plaintiff b limiting the contingency to 25%." *Wells II*, 907 at 37..

Further, the legislative history does not evidence any Congressional intent to require that attorneys for Title II plaintiffs assume all the risk of loss, i.e., not transfer any of the risk of loss to Title II plaintiffs who receive Title II benefits as part of the court judgments in their favor. Yet, this is the practical effect of the lodestar method if the lodestar is not enhanced to reflect the contingent nature of the fee.

B. By Its Plain Language, 42 U.S.C. § 406(b) Does Not Require Use Of The Lodestar Method.

Besides requiring the use of a contingent fee agreement between a Title II plaintiff and the plaintiff's attorney, § 406(b) does not require the use of the lodestar method. Section 406(b)(1) states, in pertinent part, that "[w]henever a court renders a judgment favorable to a

claimant . . . who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. § 406(b)(1).

By its plain terms, § 406(b) authorizes a court to award a "reasonable" attorney fee limited only by the cap of 25% of the plaintiff's past-due benefits. 42 U.S.C. § 406(b). Beyond this, nothing in § 406(b)(1) regulates what plaintiffs for Title II benefits may promise to pay their attorneys if they win. *Id.* Certainly, § 406(b)(1) does not prevent the plaintiff from promising an attorney a percentage of the past-due benefits that are awarded so long as the percentage is 25% or less. 42 U.S.C. § 406(b); *see also* Sen. Rep. No. 404, 1965 U.S.C.C.A.N. 1943, 2062. Neither the statute nor its legislative history displays any intent to invalidate contingent fee arrangements. Nor is there anything in the legislative history to suggest that, beyond the expressly stated 25% cap on past-due benefits, Congress intended § 406(b)(1) to limit the freedom of Title II plaintiffs to contract with their attorneys.

Indeed, depriving plaintiffs of the option of promising to pay the maximum statutory fee, if that is necessary to secure counsel of their choice, would contravene the purpose of § 406(b)(1) to enable Title II plaintiffs to secure competent counsel.

Venegas v. Mitchell, 495 U.S. 82 (1990), is elucidative. In *Venegas*, this Court recognized that the general purpose of § 1988 in civil rights cases was to enable plaintiffs

to secure competent counsel by ensuring adequate compensation to their attorneys. *Venegas*, *Id.* at 89-90. However, a civil rights plaintiff may, without offending the purpose of § 1988, contract to pay plaintiff's attorney more than the amount of the fee shifted to the defendant through an agreement to pay the attorney a contingent fee. *Id.*

The general purpose of § 406(b)(1) is no different. It is entitled to equal deference. Thus, just as a civil rights plaintiff may, without offending the purpose of § 1988, contract to pay his or her attorney more than the amount of the fee shifted to the defendant, *see Venegas*, 495 U.S. at 89-90, so too a Social Security plaintiff may normally contract up to the maximum allowed by statute without offending § 406(b).

C. Because The Protections of Title II Plaintiffs Through 42 U.S.C. § 406(b) And The EAJA Offset Are Comparatively Vast, The Lodestar Method Used Without An Enhancement To Reflect The Contingent Nature Of The Attorney Fee Is Inappropriate.

The protections of plaintiffs for Title II benefits in 42 U.S.C. § 406(b) are vast when compared with the protections of plaintiffs for Title XVI benefits and when compared with the protections of claimants at the administrative level for Title II and Title XVI benefits. This is a strong reason why a Court should not impose still another protection of plaintiffs for Title II benefits by refusing to apply the contingent fee method or refusing to enhance the lodestar to reflect the contingent nature of the fee when applying the lodestar method.

As noted, Congress did *not* prohibit § 406(b) contingent fee agreements, but instead required contingent fee agreements and concomitantly chose to regulate those agreements. Moreover, the statutory limitation on attorney fees in § 406(b) favors plaintiffs for Title II benefits in three substantial ways. *First*, contingent fee agreements are limited to fees from past-due benefits. Thus, unlike the practice in personal injury cases where the fee may be 30-40% of a lifetime of benefits, § 406(b) fees are recouped only from past-due benefits.

Second, contingent fee agreements are capped at a maximum of 25% of past-due Title II benefits. An attorney cannot receive a portion of the Title II plaintiff's future benefits (which may be for the plaintiff's entire life) or a portion of the value of medical care tied to Title II benefits (e.g., Medicare). Thus, § 406(b) leaves untouched major benefits achieved through litigation – health care insurance and future benefits (subject to a continuing disability review).

Third, under § 406(b), only a "reasonable" attorney fee is awarded.

In contrast to these three protections of Title II plaintiffs through § 406(b), there is no limitation in the Social Security Act on the amount of attorney fees an attorney may charge a plaintiff seeking only Title XVI benefits, i.e., Supplemental Security Income. Although a court may not award attorney fees to an attorney for a plaintiff for Title XVI benefits as a portion of any Title XVI benefits, *see Bowen v. Galbreath*, 485 U.S. 74 (1988), the Social Security Act does not prohibit an attorney from charging a plaintiff for Title XVI benefits any amount of future or past-

due benefits that the plaintiff receives as a result of a court judgment. Of course, there are limitations on attorney fees outside of the Social Security Act, e.g., the usual rules of the relevant state bar. Yet, absence of regulation of attorney fees in the Social Security Act for Title XVI plaintiffs is evidence that Congress did not intend § 406(b) to provide Title II plaintiffs with more protection than § 406(b) expressly provides.

A comparison with fees for representation at the administrative level under 42 U.S.C. § 406(a) is also instructive. Congress explicitly endorsed contingent fee agreements in § 406(a) cases. Under § 406(a), if the statutory requisites are met, the agency automatically approves as an attorney fee 25% of past-due benefits, or $4,000, whichever is less *even if the effective hourly rate is $4,000*. 42 U.S.C. § 406(a). As the Sixth Circuit has noted with respect to § 406(b):

> It is not at all unusual for contingent fees to translate into large hourly rates if the rate is computed as the trial judge has computed it here [dividing the total award by the number of hours spent on the case]. In assessing the reasonableness of a contingent fee award, we cannot ignore the fact that the attorney will not prevail every time. The hourly rate in the next contingent fee case will be zero, unless benefits are awarded. Contingent fees overcompensate in some cases and undercompensate in others. It is the nature of the beast.

Royzer v. Secretary of Health and Human Servs., 900 F.2d 981, 982 (6th Cir. 1990). Because Congress directed the agency to approve summarily certain fees for representation at the administrative level even if the hourly rate is

many times what any reasonable non-contingent hourly rate would be, this Court should infer that Congress did not intend for the contingent nature of a fee under § 406(b) not to be taken into account when a court determines the amount of an attorney fee under § 406(b).

Further, in contrast to § 406(b)'s 25% cap on an award from past-due benefits, under § 406(a), if an attorney chooses not to pursue an automatic fee authorization, the attorney may petition the agency to approve an attorney fee up to 100% of past-due benefits. 42 U.S.C. § 406(a). Indeed, under the agency's regulation, the agency "may authorize a fee even if no benefits are payable." 20 C.F.R. § 404.1725(b)(2) (2001). The statutory reference to a fee of 25% of past due Title II benefits under § 406(a) addresses only what the agency will automatically approve and withhold as a potential fee. 42 U.S.C. § 406(a).

Thus, viewed in the context of the absence of protection of Title XVI plaintiffs, the routine payment of attorney fees under § 406(a) inconsistent with any lodestar calculation without an enhancement to reflect the contingent nature of the fee, and potential recovery of 100% of any past-due Title II or Title XVI benefits under § 406(a), the lodestar method for computing an attorney fee under § 406(b) is alien to the Social Security Act. Rephrased, it would be inconsistent for Congress to respect as a routine matter contingent fee agreements for § 406(a) fees reflecting the contingent nature of the fee, yet disrespect contingent fee agreements for § 406(b) fees insofar as those agreements took into account the contingent nature of the fee.

Section 406(b) does not exhaust the protections Congress affords a Title II plaintiff. Apart from any attorney fee under § 406(b), a plaintiff may receive an award of attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). A court awards attorney fees under the EAJA when, among other things, the plaintiff is a prevailing party, the government's position was not substantially justified, and the plaintiff is an eligible party by virtue of his or her net worth. 28 U.S.C. § 2412(d)(1), (2). Significantly, Congress requires any recovery under § 406(b) to be offset by any award of attorney fees under the EAJA:

> (b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. 99-80, § 3, 99 Stat. 186 (1985). The EAJA offset thus potentially drastically reduces any attorney fees under § 406(b). For instance, if an EAJA award and § 406(b) award are based on the same number of hours of attorney time, a plaintiff would ultimately pay only the difference in the hourly rates for the EAJA and § 406(b) awards. Therefore, if the hourly rate after giving effect to a plaintiff's agreement to pay 25% in past due Title II benefits is $225.00, if the hourly rate for the § 406(b) fee under the lodestar method is $150.00, and if the hourly

rate for the EAJA award is $140.00,[7] the plaintiff would ultimately pay his or her attorney only $85.00 per hour under the contingent fee method or $10.00 per hour under the lodestar method. Obviously, then, for the large class of plaintiffs for Title II benefits who are also entitled to EAJA awards, the attorney fee ultimately paid will be less than the attorney fee calculated under either lodestar or contingent fee methods.

In sum, given the comparatively vast protections of Title II plaintiffs through § 406(b) and the additional protection of the EAJA offset, a court should use the contingent fee method when calculating the amount of a § 406(b) award when the plaintiff and plaintiff's attorney have previously agreed to compensate plaintiff's attorney in terms of the past-due benefits recovered.

III. Under the American Rule Of 42 U.S.C. § 406(b), Reasonable Attorney Fees Paid By A Private Plaintiff For Title II Benefits To The Plaintiff's Attorney May Reflect The Contingent Nature Of The Fees.

Under the American Rule, parties are ordinarily required to bear their own attorney fees – the prevailing party is not entitled to collect from the loser. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 121 S.Ct. 1835, 1839 (2001); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

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[7] The EAJA permits courts to award attorney fees reflecting an increase in the cost of living over the EAJA's statutory rate of $125.00. 28 U.S.C. § 2412(d)(2)(A). Roughly, the EAJA hourly rate for 2001 reflecting an increase in the statutory rate due to the increase in the cost of living is $140.00.

Consistent with the American Rule, agreements between plaintiffs and their attorneys to pay attorney fees based on a contingent fee reflecting the contingent nature of the fees are common in modern civil litigation and pervasive in some areas of modern civil litigation such as personal injury. *See, generally,* American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.5 (2001); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735-37 (1987) (Blackmun, J., dissenting) (describing contingent fee agreements in the private marketplace) There is no basis in law or in the modern legal marketplace to maintain that a contingent fee agreement in which the compensation reflects the contingent nature of the fee is ipso facto unreasonable or presumptively unreasonable when the underlying civil action concerns the allocation of money outside of the context of family law. Moreover, because Congress crafted § 406(b) with full awareness of the use of contingent fee agreements for recovery of Title II benefits, Congress cannot reasonably be imputed to have legislated that "reasonable" attorney fees under § 406(b) do not include attorney fees awarded consistent with a contingent fee agreement reflecting the contingent nature of the fees. By restricting awards of attorney fees under § 406(b) to "reasonable" fees, Congress did not declare unreasonable contingent fee agreements between a private party and that private party's attorney that accounted for the contingent nature of the fees.

IV. The Rule Of *City of Burlington v. Dague* Has No Application In The Context of 42 U.S.C. § 406(b) Involving A Private Plaintiff's Contract With That Plaintiff's Own Attorney.

The rule of this Court is clear with respect to fee-shifting statutes: neither the contingent fee method nor the lodestar method with an enhancement for a contingent recovery may be used to calculate a "reasonable" fee under a fee-shifting statute. *City of Burlington v. Dague*, 505 U.S. 557, 562-67 (1992). This rule of *Dague* has no application in the context of § 406(b).

First and most obviously, § 406(b) is not a fee-shifting statute, but the partial regulation of agreements between private plaintiffs and those plaintiffs' attorneys.[8] Section 406 is not a fee-shifting statute where the winner's attorney fees are paid by the loser; it is a statute which places a "*parens patriae* limit on the amount of fees an attorney may receive from a disability claimant." *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989).

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[8] Yet, when there is a fee-shifting statute in addition to § 406(b) – i.e., the EAJA – this does not negate a plaintiff's contract with the plaintiff's attorney to pay an attorney fee in excess of any attorney fee recovered from the defendant. *See Venegas*, at 89-90 ("But neither *Blanchard* nor any other of our cases has indicated that § 1988, by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents. Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further § 1988's general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.").

Second, *Dague* did not involve a case in which the plaintiff's attorney was prohibited from charging a plaintiff a non-contingent fee. In *Dague*, the plaintiffs' attorneys were free to contract with the plaintiffs to pay attorney fees irrespective of the outcome of the litigation. Section 406(b), however, prohibits attorneys from receiving non-contingent fees from plaintiffs for Title II benefits.

Third, in *Dague*, this Court was concerned with the "ready administrability" of calculating a contingency enhancement to the lodestar calculation. *Dague*, 505 U.S. at 566. The same concern does not exist in the § 406(b) context where reference to the underlying agreement between the Title II plaintiff and the plaintiff's attorney can guide the calculation of an attorney fee reflecting the contingent nature of the fee. *See Wells II*, 907 F.2d at 371 ("Third, because § 406(b) requires the district court to review the reasonableness of any requested fee, contingent fee agreements cannot simply be adopted as per se reasonable in all social security cases. We must recognize, however, that a contingency agreement is the freely negotiated expression both of a claimant's willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment. Therefore, we ought normally to give the same deference to these agreements as we would to any contract embodying the intent of the parties.") (internal citations omitted); *McGuire*, 873 F.2d at 981 ("Although we do not go as far as the *Rodriquez* court in finding a presumption in favor of a twenty-five percent contingency agreement, we agree with that court's reasoning that we should follow a more efficient

system for fee analysis and should defer to the parties' intentions where reasonable."); *Rodriquez*, 865 F.2d at 746 ("Nevertheless, if the agreement states that the attorney will be paid twenty-five percent of the benefits awarded, it should be given the weight ordinarily accorded a rebuttable presumption.").

In short, there is no tension between the rule of *Dague* and use of the contingent fee method to calculate court-awarded, plaintiff-paid attorney fees under § 406(b).

This Court should grant the petition for a writ of certiorari to resolve the split in the Circuits over the appropriate method for calculating reasonable attorney fees pursuant to 42 U.S.C. § 406(b). The Court should then hold that a court should use the contingent fee method to calculate reasonable attorney fees pursuant to § 406(b).

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY E. GISBRECHT, *Plaintiff-Appellant,* v. KENNETH S. APFEL, Commissioner of the Social Security Administration, *Defendant-Appellee.*	No. 99-35496 D.C. No. CV-98-00437-JAR

BARBARA A. MILLER, *Plaintiff-Appellant,* v. KENNETH S. APFEL, Commissioner of the Social Security Administration, *Defendant-Appellee.*	No. 99-35497 D.C. No. CV-96-06164-DCA

NANCY SANDINE,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-36038
D.C. No.
CV-97-06197-JMS

DONALD L. ANDERSON,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-36131
D.C. No.
CV-96-06311-MRH
ORDER

Filed January 22, 2001

Before: Cynthia Holcomb Hall, Pamela Ann Rymer, and Susan P. Graber, Circuit Judges.

ORDER

The Memorandum disposition filed November 27, 2000, with modifications, is redesignated as an authored Opinion by Judge Graber.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY E. GISBRECHT,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-35496
D.C. No.
CV-98-00437-JAR

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

BARBARA A. MILLER,
Plaintiff-Appellant,
v.
KENNETH S. APFEL,
Commissioner of the
Social Security
Administration,
Defendant-Appellee.

No. 99-35497
D.C. No.
CV-96-06164-DCA

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

NANCY SANDINE,
Plaintiff-Appellant,
v.
KENNETH S. APFEL, Commissioner of the Social Security Administration,
Defendant-Appellee.

No. 99-36038
D.C. No.
CV-97-06197-JMS

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

DONALD L. ANDERSON,
Plaintiff-Appellant,
v.
KENNETH S. APFEL, Commissioner of the Social Security Administration,
Defendant-Appellee.

No. 99-36131
D.C. No.
CV-96-06311-MRH

OPINION

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted
November 17, 2000 – Portland, Oregon

Filed November 27, 2000

Before: Cynthia Holcomb Hall, Pamela Ann Rymer, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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OPINION

GRABER, Circuit Judge:

These cases were consolidated for oral argument. In each case, a district court reversed a decision of the Commissioner of the Social Security Administration, and Plaintiffs sought attorney fees under 42 U.S.C. § 406(b)(1)(A).[1] The district courts awarded attorney fees, but in lesser amounts than Plaintiffs had requested. Plaintiffs appeal. We review for abuse of discretion, *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998), and affirm.

I. ARGUMENTS COMMON TO ALL FOUR CASES

Plaintiffs argue on several grounds that the district courts abused their discretion. Their primary arguments – concerning the hourly lodestar rate and the requested enhancement based on the contingent nature of the fee

[1] Although the disabled claimants – Gisbrecht, Miller, Sandine, and Anderson – are the named plaintiffs in these actions, the real parties in interest are their lawyers, Tim and Ralph Wilborn. For convenience, the Wilborns are referred to as "Plaintiffs."

arrangement – pertain to all four cases, with minor differences as noted.

This court follows the "lodestar" method of calculating fees under 42 U.S.C. § 406(b)(1)(A). *Allen v. Shalala*, 48 F.3d 456, 458 (9th Cir. 1995); *Starr v. Bowen*, 831 F.2d 872, 874 (9th Cir. 1987).[2] The lodestar method requires a court to determine a reasonable hourly rate and then to multiply that rate by the number of hours reasonably expended on the case; the product determines a reasonable fee. *See Allen*, 48 F.3d at 458. That fee may be adjusted by applying the 12 factors set out in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). *Allen*, 48 F.3d at 458. Only one of those factors is at issue in this case: "whether the fee is fixed or contingent." *Kerr*, 526 F.2d at 70.

A. *The District Courts Did Not Abuse Their Discretion in Determining Plaintiffs' Hourly Lodestar Rates.*

The district courts in each of these cases set hourly lodestar rates lower than those that Plaintiffs had

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[2] So do the Fifth Circuit, *see Brown v. Sullivan*, 917 F.2d 189 (5th Cir. 1990); the Eighth Circuit, *see Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989); and the Fourth Circuit, *see Craig v. Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989).

Other circuits follow the "contingency" method, under which a court bases its award of fees on the contingent-fee contract between the attorney and the claimant, treating that contract as presumptively reasonable. *See Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990); *McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989); *Rodriguez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (en banc).

This court has noted the split of circuits and has rejected the contingency method expressly. *Allen*, 48 F.3d at 459.

requested. Plaintiffs argue that the district courts abused their discretion in so doing, because the evidence that they presented was sufficient to demonstrate that the rates that they requested were in line with the "market rate."

Plaintiffs' argument on this issue is twofold. *First*, they argue that the actual "market rate" for their services is the maximum fee allowed under 42 U.S.C. § 406(b): 25 percent of the past-due benefits that the claimants recovered. In so arguing, Plaintiffs are in essence asking the panel to adopt the contingency method, see *supra* note 2. But, as noted, this court has rejected the contingency method. *Allen*, 48 F.3d at 459. "The district court does not sit to approve routinely a contingent fee contract between social security claimants and their counsel." *Starr*, 831 F.2d at 874.

Rather, a district court must set a reasonable lodestar rate for counsels' services. To the extent that Plaintiffs are arguing that 25 percent *is* the appropriate lodestar rate, and thereby are attempting to blur the distinction between the lodestar and contingency methods, their argument is unavailing. A lodestar rate is "a reasonable *hourly* rate." *Widrig*, 140 F.3d at 1209 (emphasis added) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). But 25 percent is not an "hourly rate."

Second, Plaintiffs point out that, in some previous cases, they received awards of as much as $175 per hour (Tim Wilborn) and $200 (Ralph Wilborn) under 42 U.S.C. § 406(b)(1)(A). The district courts here considered that evidence but chose instead to follow cases in which Plaintiffs had received awards based on lower hourly rates.

The district courts did not abuse their discretion in so doing.

In the same vein, Plaintiffs argue that their requested hourly rates are "in line" with the rates reported in a recent survey by the Oregon State Bar. The district courts that referred to the survey used it as evidence of the average hourly rates of lawyers in Plaintiffs' geographic area. The survey reveals that the average hourly rate for a lawyer of Tim Wilborn's experience is $125 and that the average hourly rate for a lawyer of Ralph Wilborn's experience is $150. The district courts that considered the survey awarded those average hourly rates. Plaintiffs suggest another way in which the district courts *could have* used the information in the survey, which would have yielded a higher hourly rate, but do not explain why the manner in which the courts *did* use that information was improper.

B. *The District Courts Did Not Abuse Their Discretion by Refusing to Increase the Lodestar Based on Plaintiffs' Contingent-Fee Contracts.*

Plaintiffs also argue that the district courts abused their discretion by refusing to increase the lodestar fees based on the contingent nature of their fee agreements.

First, in *Gisbrecht*, Plaintiffs argue that the district court should have (1) considered the inherent riskiness of Social Security appeals *as a class*, (2) noted that *all* such appeals are risky propositions, and (3) enhanced the lodestar fee to take account of that inherent risk. That argument already has been rejected by this court. *See Widrig*, 140 F.3d at 1210-11 (rejecting the plaintiff's request for a

contingency-based enhancement and specifically rejecting the argument "that we should examine the contingency of Social Security cases as a class rather than assessing the riskiness of a particular case").[3]

Next, Plaintiffs argue that the district courts should have applied "contingency enhancement factors" or "risk multipliers" to their lodestar fees. Essentially, Plaintiffs argue that the district courts should have multiplied the hourly lodestar rates by a mathematically derived number to account for the fact that lawyers who accept contingent-fee contracts in Social Security cases sometimes do not get paid.

This court also has rejected that argument. In *Straw v. Bowen*, 866 F.2d 1167, 1170 (9th Cir. 1989), the court addressed the plaintiffs' contention that their requested hourly rates were "justified by the 'big picture': the individual rates in these . . . cases may be high, but they are balanced by the low fee awards (or no fee awards) in other cases." In rejecting that contention, this court concluded that the plaintiffs were "essentially asking victorious claimants to 'subsidize' the claims of losing claimants" by "tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants." *Id.* at 1171. Plaintiffs' argument is, at bottom, the argument that this court rejected in *Straw*.

Finally, Plaintiffs argue that the *Miller* and *Anderson* courts did not explain adequately their refusal to increase the lodestar fees based on the contingent-fee agreements.

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[3] Plaintiffs do not argue that any of these four cases was particularly risky on an individual basis.

That argument, too, is foreclosed by this court's cases. Although a district court must *consider* a plaintiff's request to increase a fee on this basis, *Allen*, 48 F.3d at 460, a court "is not required to articulate its reasons" for accepting or rejecting such a request, *Widrig*, 140 F.3d at 1211.

II. ARGUMENT SPECIFIC TO *MILLER*

Finally, Plaintiffs argue that the *Miller* court failed to explain its conclusions adequately. Plaintiffs rely in part on *Jordan v. Multnomak County*, 815 F.2d 1258, 1263 (9th Cir. 1987), which reversed an award of attorney fees because the record contained no basis for the amount awarded. Ralph Wilborn made the same argument in *Widrig*. *See* 140 F.3d at 1210. In rejecting the argument, the *Widrig* court gave some guidance as to how detailed a district court's order must be:

> However, unlike *Jordan*, the district court in the instant cases did make findings regarding the sufficiency of the evidence submitted by appellants and explained the reasons for its conclusions. The court found that the Johnson and Brewer affidavits were insufficient to support an hourly rate of $200. In Widrig's case, it also reasoned that counsel had recently been awarded fees at an hourly rate of $175, further justifying $175 as a reasonable lodestar rate. Thus, there was no abuse of discretion.

Id.

So too here. The magistrate judge found (1) that Plaintiffs' affidavits were insufficient to establish that their requested rate was the appropriate rate; (2) that the

case was neither complex nor novel; (3) that the amount of time that Plaintiffs had expended on the case, while reasonable, was "more than would be expected of practitioners claiming the right to increased hourly rates based on increased knowledge of and specialization in the social security area"; and (4) that Tim and Ralph Wilborn recently had been awarded hourly fees of $125 and $150, respectively, in a Portland Social Security case. The district court adopted the magistrate judge's findings and recommendations, with some elaboration.

Thus, the district court's order, taken together with the magistrate judge's findings and recommendations, contained findings and explanations comparable to those that this court approved in *Widrig*. As in *Widrig*, we conclude that the order was sufficiently detailed. The district court did not abuse its discretion.

CONCLUSION

For the reasons stated, we conclude that the district courts did not abuse their discretion and affirm the awards of attorney fees in all four of these cases.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD ANDERSON, Plaintiff, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	Case No. 96-6311-HO ORDER (Filed Sep. 29, 1999)

This matter is before the court on plaintiff's motion (#31) for attorney's fees pursuant to 42 U.S.C. §406(b).

BACKGROUND

Pursuant to the judgment in this action, filed in January, 1998, the Commissioner's decision was reversed and remanded for additional proceedings, where benefits were awarded. Plaintiff's attorney spent 57.22 hours related to this action, and is now seeking $10,013.50, i.e. $175.00 per hour, in attorney's fees.

SUMMARY OF PARTIES ARGUMENTS

Plaintiff argues that his attorney, Tim Wilborn, should be awarded $175.00 per hour for his services. 42 U.S.C. §406(b) allows the court to award attorney's fees up to 25% of plaintiff's retroactive benefits. Plaintiff argues that $175.00 per hour, or 7.8% of the retroactive

benefits, is a reasonable fee. Defendant argues that market rates establish that $125.00 per hour is a reasonable fee.

DISCUSSION

Section 406(b) of the Social Security Act provides that a court may award attorney's fees in a civil action brought to recover past-due benefits under Title II of the Act. 42 U.S.C. §406(b)(1). The maximum amount allowable is 25% of the total past-due benefits. 42 U.S.C. §406(b)(1). The fees are payable "out of, and not in addition to" the award of benefits. *Id.*

In establishing the proper attorney's fees under the Social Security Act, a court begins with the Supreme Court's directive that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)); *see also Greater Los Angeles Council on Deafness v. Community Television of S. Calif.*, 813 F.2d 217, 221 (9th Cir. 1987).

This "lodestar" amount is the predominant element of the analysis. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987). However, the court may adjust the fee by considering the following twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or

contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *see also Hensley*, 461 U.S. at 434 n.9.

Plaintiff contends that the requested rate of $175.00 per hour is appropriate because plaintiff was represented pursuant to a contingency fee contract and because the fees are within the parameters set by the Social Security Act. Alternatively, plaintiff argues that this court previously found a $175.00 per hour fee reasonable for Tim Wilborn, and thus should again award him this hourly rate.

While the contingent nature of a contract is one factor that the district court should consider and may, if it chooses, factor into its determination of a reasonable fee, it must not be used to subsidize the claims of losing plaintiffs by inflating the fees of winning plaintiffs. *Allen v. Shalala*, 48 F.3d 456, 459-460 (9th Cir. 1994). Further, the cases plaintiff cites to demonstrate that Tim Wilborn has previously been awarded $175.00 per hour by this court, *Blair v. Chater*, No. 95-6135-HA (D.Or.), and *Widrig v. Chater*, No. 94-6503-TC (D.Or.), do not support his argument.

In *Blair*, the court awarded fees in a lump sum without mention of an hourly rate. In *Widrig*, both Ralph Wilborn and Tim Wilborn were awarded hourly fees of $175.00. However, the majority of the hours billed were

for work done by Ralph Wilborn, a more experienced attorney specializing in social security disability cases.

This court, upon review of the record, consideration of the above mentioned factors, and review of this district's reasonable hourly fee awards in social security cases for attorneys of comparable skill, reputation and experience, finds that this case was not an unusually complex social security disability claim and therefore an hourly rate of $150.00 is reasonable compensation. Thus, the lodestar amount is 57.22 hours multiplied by $150.00 per hour, or $8,583.00.

An attorney for a social security claimant may apply for attorney's fees under both 42 U.S.C. §406 and the EAJA. However, if fees are awarded under both statutes, he must reimburse the claimant the smaller of the two amounts. *See Freedle v. Bowen*, 674 F.Supp. 799, 801 (D.Nev. 1987) (citing H.R. Rep. No. 99-102, 99th Cong., 1st Sess. 20, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 148-49). Here the award under 42 U.S.C. §406 ($8,583.00) is greater than the $5,866.84 EAJA award already recovered. Thus, $5,866.84 must be subtracted from $8,583.00 for a total of $2716.16 to be paid from plaintiff's retroactive benefits.

CONCLUSION

For the reasons noted above, plaintiff's motion for attorney's fees (#31) is granted to the extent that an attorney's fee of $2716.16 is authorized to be paid from the past-due benefits of plaintiff.

IT IS SO ORDERED.

DATED this 28th day of September, 1999.

/s/ Michael R. Hogan
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GARY GISBRECHT, Plaintiff, vs. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	Civil No. 98-437-RE ORDER (Filed Apr. 14, 1999)

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Attorneys for defendant

REDDEN, Judge:

On November 18, 1998, the court entered an order awarding fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"), in the amount of $3,339.11. Claimant's counsel now moves the court for an award under 42 U.S.C. § 406(b)(1)(A) in the amount of $7,091.50, to be offset by the amount already awarded

under the EAJA. The Commissioner opposes the motion. The court awards fees in the amount of $3,135.00.

STANDARDS

Section 406(b)(1)(A) of the Social Security Act provides:

> Whenever a court renders a favorable judgment to a claimant . . . who was represented before the court by an attorney, the court may . . . allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total past-due benefits to which the claimant is entitled. . . .

An award of fees under both the EAJA and § 406(b)(1)(A) does not amount to double recovery for the attorney, because the attorney must give the smaller of the two awards to his client to compensate for his litigation costs. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991).

However, § 406(b)(1) is not a fee-shifting statute. *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989). Instead, it is a "*parens patriae* limit on the amount of fees an attorney may receive from a disability claimant." *Id.* While Congress did intend to "ensure that attorneys would receive some fees for their representation," *id.*, the disability award from which the attorney's fee is paid "is normally an already-inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987), *quoted in Allen v. Shalala*, 48 F.3d 456, 458-59 (9th Cir. 1995).

Keeping these factors in mind, the court is required to calculate reasonable attorney's fees based on the lodestar method. *Allen*, 48 F.3d at 459. Under this method, the court first determines a reasonable hourly rate. The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those of lawyers of reasonably comparable skill, experience, and reputation. *Straw*, 866 F.2d at 1169, *citing Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984).

The court multiplies the rate by the number of hours reasonably expended on the litigation to arrive at a presumptively reasonable fee. The fee may then be adjusted by considering, among other things, the fact that the attorney accepted employment on a contingency basis. *Allen*, 48 F.3d at 458. However, the court is not to treat a contingent fee arrangement as presumptively fair and reasonable; the district court "does not sit to approve routinely a contingent fee contract between social security claimants and their counsel." *Id., quoting from Starr*, 831 F.2d at 874.

DISCUSSION

Counsel requests a fee award in the amount of $7,091.50 or 25% of claimant's retroactive benefits, the maximum which may be awarded under § 406(b)(1). Counsel asserts that he expended 25.08 hours on this case; representation was limited because the Commissioner conceded liability and stipulated to a remand for an award of benefits. The requested amount of $7,091.50 represents $283.64 per hour. In the alternative, counsel

requests that he be awarded at least $175.00 per hour, or $4,389.00.

Counsel asserts that obtaining from the Commissioner an agreement to stipulate to a remand for benefits was an extraordinary result which entitles him to an enhanced fee. Counsel argues that the issues raised in claimant's opening brief were both factually and legally intensive, and that the brief contained critical issues which might have been overlooked by a less experienced practitioner. I disagree.

The issue in this case was whether claimant, whom the ALJ found disabled for a closed period from August 27, 1993 through January 31, 1996, had a continuing disability after January 31, 1996. Counsel argued in the opening brief that the ALJ 1) misconstrued the medical evidence to support a finding that claimant had improved medically; 2) failed to consider claimant's impairments in combination; 3) improperly rejected claimant's testimony; and 4) failed to include a limitation in the hypothetical question to the vocational expert.

I have reviewed the claimant's opening brief and find nothing particularly difficult, complex or novel about the issue involved or the arguments made; the legal analysis and the cases cited are standard in Social Security claimants' briefs. The fact that the Commissioner conceded the case and stipulated to the award of continuing disability benefits suggests to me, not that the briefing was difficult or complex, but rather that the evidence so strongly favored the claimant that the Commissioner wisely declined to contest the case. This cannot necessarily [sic]

attributed to extraordinary advocacy skills, and does not necessarily justify an hourly rate of almost $300 an hour.

Counsel has submitted affidavits asserting that the prevailing rate in the community for Social Security cases is 25% of past due benefits. This evidence is unpersuasive. The statutory maximum of 25% of past due benefits is not routinely awarded in this court and carries no presumption of reasonableness. See *Straw*, 866 F.2d at 1170 (court declines to award full 25% if resulting hourly rate would be unreasonable). The Commissioner has submitted a recent survey by the Oregon State Bar, published in the monthly bulletin of the Bar, showing that the average billing rate for attorneys in private practice with 4-6 years of experience in the county where counsel practices is $89.00 an hour. Claimant's counsel has practiced law less than five years; while a specialty in Social Security cases has no doubt conferred substantial expertise in this area, I am not persuaded that almost $300 an hour is a reasonable fee for a relatively recent admittee to the bar. I find that $125.00 an hour is a reasonable fee.

The contingency factor does have some bearing on this hourly rate; the risk of nonpayment is a factor to be considered in adjusting the lodestar figure. *Straw*, 866 F.2d at 1170. But although the court should consider the contingency basis of counsel's employment, it should not "unquestioningly approve the amount negotiated by the parties." *Id.* at 1169. District courts have been admonished that they cannot use the contingency factor to subsidize the claims of losing claimants, because to do so is "fundamentally unfair to the claimants who depend upon

back benefit recoveries," and is also "contrary to congressional intent to protect claimants by limiting fee awards." *Allen*, 48 F.3d at 460.

In *Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998), the court approved a decision not to enhance a fee for contingency when there is no evidence that the case is unusually risky. I can find nothing risky in this particular case – in fact, the record suggests that claimant's winning was more of a sure thing than usual – and therefore decline to enhance the fee award on the basis of a contingent fee agreement between counsel and the claimant.

After balancing the need to make the attorney's compensation sufficient to encourage members of the bar to undertake representation of disability claimants with the meagerness of the claimant's Social Security stipend, and applying an hourly rate of $125 per hour for Tim Wilborn to the 25.08 hours expended on this case, the court concludes that a reasonable fee under 42 U.S.C. § 406(b)(1) is $3,135.00.

Pursuant to 42 U.S.C. § 406(b)(1), claimant is awarded attorney fees in the amount of $$3,135.00.

IT IS SO ORDERED.

Dated this 14 day of April, 1999.

/s/ James A. Redden
James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA A. MILLER, Plaintiff, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	Civil No. 96-6164-AS OPINION AND ORDER (Filed Mar. 30, 1999)

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FRYE, Judge:

The Honorable Donald C. Ashmanskas, United States Magistrate Judge, filed his Findings and Recommendation on January 15, 1999, regarding plaintiff's attorney fees in this Social Security case. He reduced the hourly rate requested by plaintiff's two attorneys by $50.00 an hour. The attorneys filed their objections on January 28, 1999. The Social Security Administration has not filed a response.

There are five objections:

1. Does Koser apply?

Magistrate Judge Ashmanskas stated that he adopted the reasoning and conclusions of the Honorable James A. Redden, United States District Judge, as set forth in *Koser v. Callahan*, Civil No. 96-6244-RE (November 14, 1997). Judge Redden found that a reasonable hourly rate for attorney Ralph Wilborn was $150.00 an hour, and that a reasonable hourly rate for attorney Tim Wilborn was $125.00 an hour. Plaintiff contends that *Koser* neither pertains to the instant case, nor controls the attorney fee award because the attorneys' affidavits were the only evidence presented to the *Koser* court, whereas the attorneys in this case have provided affidavits from other attorneys, their own affidavits, and extensive time sheets showing that they have been previously paid the hourly rates that they requested here. While plaintiff's attorneys have provided much more evidence than was provided in *Koser*, an award of attorney fees pursuant to 42 U.S.C. § 406(b) is discretionary with the court. The standard is that the court "*may*" award up to twenty-five percent of plaintiff's retroactive benefits. The twenty-five percent of

plaintiff's retroactive benefits that the court may award is a *maximum* amount; it is not a requirement. Even with the additional evidence that plaintiff's attorneys presented to Magistrate Judge Ashmanskas, it is still within his discretion to award the hourly fee he believes is reasonable.

2. Is plaintiff's age relevant?

Plaintiff decries the fact that Magistrate Judge Ashmanskas made reference to her age. When Magistrate Judge Ashmanskas found that the case was neither complex nor novel with regard to its legal and factual issues, he noted that plaintiff's counsel had argued that she was a college-educated, younger individual, when she was actually fifty years old at the time the case was before the court and had attended bookkeeping school for only three to four months. Plaintiff contends that her age has no bearing on the merits of the case. It appears to this court that Magistrate Judge Ashmanskas was pointing out that plaintiff's counsel had bent the facts slightly in order to gain support for plaintiff's attorney fees request.

3. Was the evidence presented sufficient for the requested attorney fees?

Plaintiff's counsel provided sufficient evidence to support an award of attorney fees. The amount of attorney fees to be awarded is discretionary, provided that the determination is no more than twenty-five percent of plaintiff's award of retroactive Social Security benefits. Magistrate Judge Ashmanskas awarded as attorney fees little more than eighteen percent of plaintiff's retroactive

Social Security benefits as attorney fees. Magistrate Judge Ashmanskas was within legal boundaries in so doing.

4. Was it error for Magistrate Judge Ashmanskas to fail to address the contingency enhancement argument?

Plaintiff seeks consideration by this court of her argument for a contingency enhancement because Magistrate Judge Ashmanskas did not address the issue of a contingency enhancement at all. In *Allen v. Shalala*, 48 F.3d 456 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit requires the district court to consider contingency arguments. It is still within the district court's discretion to disregard the contingency argument, but it appears that the Court of Appeals wants *some* consideration of the issue.

After careful review and consideration of the record in this case, including plaintiff's contingency argument as presented in the Plaintiff's Memorandum in Support of Motion for Approval of Attorneys' Fees Pursuant to 42 U.S.C. § 406(b), the Findings and Recommendation of Magistrate Judge Ashmanskas is AFFIRMED. This court cannot provide "some guidance" to avoid this reduction of attorney fees as requested by plaintiff because the issue of attorney fees is discretionary in each case.

IT IS SO ORDERED.

DATED this 30 day of March, 1999.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA MILLER, Plaintiff, vs. JOHN J. CALLAHAN, Acting Commissioner, Social Security Administration, Defendant.	Civil No. 96-6164-AS FINDINGS AND RECOMMENDATION (FILED 1999 JAN 15)

ASHMANSKAS, Magistrate Judge:

On December 29, 1997, this court entered an order awarding fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA") in the amount of $5,164.75 and $80.42, respectively. Plaintiff's counsel now moves the court for an award under 42 U.S.C. §406(b)(1)(A) in the amount of $7,514.00, to be offset by the amount already awarded under the EAJA. The requested amount represents 39.91 hours of time expended by plaintiff's counsel at an hourly rate of $188.27. Defendant does not object to the claimed number of hours, although it does allude to the figure being high with regard to counsels' alleged expertise, but does contest the reasonableness of the requested hourly rate.

BACKGROUND

Plaintiff filed this action requesting this court to reverse the Commissioner's decision that she is not disabled. After a thorough review of the administrative record and the briefing by the parties, this court determined the final decision of the Commissioner was in error in that the Administrative Law Judge failed to properly consider plaintiff's stress intolerance, improperly discounted a physician's opinion and improperly rejected plaintiff's and a lay witness's testimony. This court held that the final decision was not supported by substantial evidence in the record, reversed the decision of the Commissioner and awarded benefits to plaintiff.

LEGAL STANDARD

Section 406(b)(1)(A) of the Social Security Act provides:

> Whenever a court renders a favorable judgment to a claimant * * * who was represented before the court by an attorney, the court may * * * allow as part of its judgment a reasonable fee for such representation, not in excess of 25% of the total past-due benefits to which the claimant is entitled * * * . In case of any such judgment, no other fee may be payable * * * for such representation except as provided in this paragraph.

An award of fees under both the EAJA and Section 406(b)(1)(A) does not amount to double recovery for the attorney. *Russell v. Sullivan*, 930 F.2d 1443, 146 (9th Cir. 1991). The award under Section 406(b) "merely allows the claimant's attorney to collect his or her fee out of the

claimant's past-due disability benefits, while the EAJA award is paid by the government to the claimant to defray the cost of legal services." *Id.* The dual fee awards are proper as long as the attorney gives the smaller of the two awards to his client to compensate her for litigation costs. *Id.*

However, Section 406(b)(1) is not a fee-shifting statute. *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989). The purpose of the statute was to limit contingency awards which "often resulted in an inordinate deprivation of benefits otherwise payable to the client." *Id.* (quoting *Watford v. Heckler*, 765 F.2d 1562, 1566 (11th Cir. 1985)). Congress also intended to ensure that attorneys receive some fees for representation. *Id.* Despite the existence of a negotiated contingency fee agreement, this court is charged with making its own inquiry into the reasonableness of the fee request. *Straw*, 866 F.2d at 1169. The court should recognize that the fee award is paid from an "already inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987).

Keeping these factors in mind, the court is required to calculate reasonable attorney's fees based on the lodestar method. *Allen v. Shalala*, 48 F.3d 456, 459 (9th Cir. 1995). Under this method, the court first determines a reasonable hourly rate. The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those lawyers of reasonably comparable skill, experience and reputation. *Straw*, 866 F.2d at 1169, citing *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984).

The court multiplies the rate by the number of hours reasonably expended on the litigation to arrive at a presumptively reasonable fee. The fee may be adjusted by considering, among other things, the fact that the attorney accepted employment on a contingency basis. *Allen*, 48 F.3d at 458. However, as noted above, the court is not to treat a contingent fee arrangement as presumptively fair and reasonable. *Id.*

DISCUSSION

In this instance, counsel requests a fee award equal to 25% of plaintiff's retroactive benefits, the maximum which may be awarded under Section 406(b)(1). Counsel asserts that the reasonable billing rates are $200 per hour for Ralph Wilborn (36.41 hours) and $175 per hour for Tim Wilborn (3.5 hours), for an actual total of $7,894.50.

Plaintiff's counsel argues that the underlying case was not a routine case in that plaintiff was a college educated, younger individual, that the issues raised were factually intensive and were sufficiently complex to require skilled counsel. However, review of the record reveals that plaintiff was 50 years at the time the case was before the court and that plaintiff had received her high school diploma and attending [sic] bookkeeping school for 3 or 4 months. The plaintiff suffered from congestive heart failure, depression, diabetes and obesity. All of these conditions are straightforward and well known among the social security bar. Finally, the issues presented to the court (failure to properly consider plaintiff's stress intolerance, improperly discounting a physician's opinion and improperly rejecting plaintiff's and a lay

witness's testimony) are hardly unique and do not qualify as complex issues. The court finds that the case was neither complex nor novel with regard to its legal and factual issues, and the result was [sic] obtained by counsel was not exceptional or rare.

The court finds that the amount of time expended in this matter, while reasonable, is more than would be expected of practitioners claiming the right to increased hourly rates based on increased knowledge of and specialization in the social security area. Additionally, the court finds that the evidence presented by plaintiffs counsel, that 25% of the retroactive benefits is the market rate for federal court representation of social security claimants, is insufficient evidence to support a finding that the requested rates are in line with those lawyers of reasonably comparable skill, experience and reputation, as required by *Straw*.

The court adopts the reasoning and conclusions of Judge Redden, as set forth in *Koser v. Callahan*, CV No. 96-6244-RE (November 14, 1997), and finds that a reasonable hourly rate for the legal services of Ralph Wilborn in this matter is $150 and that a reasonable hourly rate for Tim Wilborn is $125. Accordingly, the court finds a reasonable fee under Section 406(b)(1) is $5,461.50.

CONCLUSION

Plaintiff's motion (# 42) for attorney fees under Section 406(b)(1) should be allowed in the amount of $5,461.50.

DATED this 15th day of January, 1999.

/s/ Donald C. Ashmanskas
DONALD C. ASHMANSKAS
United States Magistrate Judge

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due February 2, 1999. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than February 16, 1999. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NANCY SANDINE, Plaintiff, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	CV-97-6197-ST FINDINGS AND RECOMMENDATION (Filed Jun. 18, 1999)

STEWART, Magistrate Judge:

INTRODUCTION

Claimant, Nancy Sandine, brings this action pursuant to the Social Security Act, 42 USC § 405(g), to obtain judicial review of a final decision of the Commissioner of the Social Security Administration ("the Commissioner"). Pursuant to a judgment entered April 13, 1998, the Commissioner's decision was reversed and remanded for payment of benefits (docket #16). A Supplemental Judgment entered on July 31, 1998 (docket #26) awarded plaintiff $6,836.10 for attorney fees (based on $130.46 per hour times 52.40 hours) and $253.16 for costs under the Equal Access to Justice Act, 28 USC § 2412(d) ("EAJA").

Plaintiff now moves the court for an award of attorney fees under 42 USC § 406(b)(1)(A) in the amount of $13,988.00, or 25% of plaintiff's retroactive benefits, to be offset by the amount already awarded under the EAJA (docket # 27). The requested amount, divided by 52.40

hours, results in an hourly rate of $266.94. Defendant does not object to the claimed number of hours, but contests the reasonableness of the requested hourly rate. For the reasons set forth below, plaintiff's request should be granted in the sum of $6,550.00.

LEGAL STANDARD

Section 406(b)(1)(A) of the Social Security Act provides that:

> Whenever a court renders a favorable judgment to a claimant . . . who was represented before the court by an attorney, the court may . . . allow as part of its judgment a reasonable fee for such representation, not in excess of 25% of the total past-due benefits to which the claimant is entitled . . . In case of any such judgment, no other fee may be payable . . . for such representation except as provided in this paragraph.

An award of fees under both the EAJA and Section 406(b)(1)(A) does not amount to double recovery for the attorney. *Russell v. Sullivan*, 930 F2d 1443, 146 [sic] (9th Cir 1991). The award under Section 406(b)(1)(A) "merely allows the claimant's attorney to collect his or her fee out of the claimant's past-due disability benefits, while the EAJA award is paid by the government to the claimant to defray the cost of legal services." *Id.* The dual fee awards are proper as long as the attorney gives the smaller of the two awards to his client to compensate her for litigation costs. *Id.* The claimant is then responsible for paying her attorney the difference between the two awards.

Section 406(b)(1) is not a fee-shifting statute. *Straw v. Bowen*, 866 F2d 1167, 1169 (9th Cir 1989). The purpose of

the statute was to limit contingency awards which "often resulted in an inordinate deprivation of benefits otherwise payable to the client." *Id*, quoting *Watford v. Heckler*, 765 F2d 1562, 1566 (11th Cir 1985). Congress also intended to ensure that attorneys receive some fees for representation. *Id.* Despite the existence of a negotiated contingency fee agreement, this court is charged with making its own inquiry into the reasonableness of the fee request. *Id.* The court should recognize that the fee award is paid from an "already inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr v. Bowen*, 831 F2d 872, 873 (9th Cir 1987).

Keeping these factors in mind, the court is required to calculate reasonable attorney's fees based on the lodestar method. *Allen v. Shalala*, 48 F3d 456, 459 (9th Cir 1995). Under this method, the court determines a reasonable hourly rate, and then multiplies that rate by the number of hours reasonably expended on the litigation. The court may then adjust that lodestar amount by considering the twelve factors in *Kerr v. Screen Extras Guild, Inc.*, 526 F2d 67 70 (9th Cir 1975). *Allen*, 48 F3d at 458. Those factors include whether the fee is fixed or contingent. However, the court is not to treat a contingent fee arrangement as presumptively fair and reasonable. *Id.*

DISCUSSION

In this instance, counsel requests a fee award of $13,988.00, which is 25% of plaintiff's retroactive benefits, the maximum which may be awarded under Section 406(b)(1). Because counsel expended 52.40 hours, this requested amount is equal to $266.94 per hour. In the

alternative, counsel submits that at least $175.00 per hour is reasonable and should be awarded. The Commissioner objects, contending that a reasonable hourly rate is $125.00 per hour.

A. Hourly Rate

The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those lawyers of reasonably comparable skill, experience and reputation. *Straw,* 866 F2d at 1169, citing *Blum v. Stenson,* 465 US 886, 896 n 11 (1984). Plaintiff's counsel, Tim Wilborn, graduated from law school and became admitted to the Oregon State Bar in 1994. He is an associate with Ralph Wilborn and Etta L. Wilborn, P.C. in Eugene, Oregon, but works in an office in downtown Portland. He limits his law practice to Social Security appeals and takes all cases strictly on a contingency fee basis set at 25% of a claimant's retroactive benefits. Although he also claims that his "current federal court contract provides for a fee of $250.00 per hour," plaintiff's Employment Agreement with her attorney makes no reference to $250.00 per hour. Affidavit of Tim Wilborn, p. 3; Plaintiff's Exhibit C.

Plaintiff argues that the lodestar should be at least $175.00 per hour before considering a contingency enhancement. To support an hourly rate of $175.00, counsel relies in part on *Widrig v. Apfel,* 140 F3d 1207, 1209 (9th Cir 1998), which affirmed attorney fee awards by Judges Hogan and Frye in two Social Security Disability cases based upon $175.00 per hour, rather than the requested

hourly rate of $200.00.[1] *Widrig* was based in part upon the lack of evidence to establish a prevailing market rate of more than $150.00 per hour charged for similar services by an attorney with 20 years experience in Social Security matters.

To remedy the deficiency of evidence in *Widrig,* plaintiff submits three affidavits in this case in an attempt to establish a prevailing market rate. Peter S. Young is a San Francisco attorney with 16 years of experience and is familiar with the general practices of attorneys in his region. His affidavit states that Social Security Disability attorneys nearly always use contingency fee contracts for 25% of the claimant's retroactive benefits; most attorney fee contracts specify that the maximum fee is a set dollar amount that is typically $4,000.00 for representation during proceedings before the Social Security Administration; and even with this upper fee limit, the typical recovery based on time expended for a successful case averages substantially above $250.00 per hour. He thus concludes that the market rate is simply 25% of the claimant's retroactive benefits. Eric Schnaufer, a Chicago attorney, and Bruce Brewer, a Washington attorney, both with several years experience in Social Security Disability cases, confirm Mr. Young's statements and also conclude that there is no true market rate other than the contingency fee of 25% of a claimant's retroactive benefits.

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[1] Although Tim Wilborn is not mentioned by name in *Widrig,* plaintiff contends that the affidavits submitted in that case establish that he expended a significant part of the time therein. This court accepts plaintiff's representation in that regard.

Because attorneys with "reasonably comparable skill, experience and reputation" in Social Security Disability cases charge a contingency fee and do not use the hourly billing method, plaintiff's counsel concedes that he cannot produce evidence of an hourly rate as the prevailing market rate. Instead, he argues that the appropriate standard to truly put him on a par with his peers is the 25% contingency fee. This argument is unavailing.

Although plaintiff relies upon *Widrig* and *Blair v. Chater*, CV No. 95-6135-HA (December 4, 1996), both of which awarded attorney fees based upon $175.00 per hour, Judge Redden recently noted in *Gisbrecht v. Apfel*, CV No. 98-437-RE (April 14, 1999), that the statutory maximum of 25% of past due benefits is not routinely awarded in this court and carries no presumption of reasonableness. In *Gisbrecht*, Judge Redden awarded attorney fees of $3,135.00 based upon an hourly rate of $125.00 for Tim Wilborn. Similarly, two other recent decisions in this court have awarded Tim Wilborn the lower hourly rate of $125.00. *Koser v. Callahan*, CV No. 96-6244-RE, Opinion by Judge Redden dated November 14, 1997 (awarding fees of $6,015.75); *Miller v. Apfel*, CV No. 96-6164-AS, Finding and Recommendation by Magistrate Judge Ashmanskas dated February 26, 1999, adopted by Judge Frye on March 30, 1999 (awarding fees of $5,461.50).

Furthermore, the Commissioner has submitted the Oregon State Bar 1998 Economic Survey, which shows that attorneys in private practice with four to six years of experience in Portland have an average billing rate of $120.00 an hour and a median billing rate of $125.00 an

hour.[2] While a specialty in Social Security Disability cases has no doubt confers [sic] substantial expertise in this area upon counsel, this court is not persuaded that $175.00 is a reasonable fee for a relatively recent admittee to the Oregon State Bar.

As have Judges Redden, Ashmanskas, and Frye, this court concludes that a reasonable hourly rate for Tim Wilborn is $125.00 per hour.

B. Adjustments to the Lodestar

To obtain an upward adjustment in the lodestar, plaintiff's counsel first argues that the underlying case was not a routine case in that the issues raised were factually intensive and were sufficiently complex to require skilled counsel. However, the issues presented to the court (improperly rejecting a physician's assessments, failing to apply the grids set forth in 20 CFR § 404, subpt. P, app. 2, and improperly rejecting plaintiff's and lay witnesses' testimony) are hardly unique and do not qualify as complex issues. The court finds that the case was neither complex nor novel with regard to its legal and factual issues, and the result obtained by counsel was not exceptional or rare.

Plaintiff also seeks an upward adjustment for the contingency nature of the counsel's representation, as well as upon the customary contingency fee of 25% of the retroactive benefits. The contingency factor, based upon

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[2] In its Memorandum, the Commissioner mistakenly relied on the lower billing rates in the survey for attorneys in the Lower Willamette Valley.

the risk of nonpayment, is a factor to be considered in adjusting the lodestar figure. Although the court should consider the contingency basis of an attorney's employment, it should not "unquestioningly approve the amount negotiated by the parties." *Straw*, 866 F2d at 1169. District courts have been admonished that they cannot use the contingency factor to subsidize the claims of losing claimants, because to do so is "fundamentally unfair to the claimants who depend upon back benefit recoveries," and is also "contrary to congressional intent to protect claimants by limiting fee awards." *Allen*, 48 F3d at 460. The 25% contingency fee may be a maximum, but cannot be viewed as a minimum for the purpose of awarding a reasonable fee.

After balancing the need to make the attorney's compensation sufficient to encourage members of the bar to undertake representation of disability claimants with the meagerness of the claimant's Social Security benefits, and applying an hourly rate of $125.00 per hour for Tim Wilborn to the 52.40 hours expended on this case, the court concludes that a reasonable fee under 42 USC § 406(b)(1) is $6,550.00.

RECOMMENDATION

Plaintiff's motion (docket # 27) for attorney fees under Section 406(b)(1)(A) should be granted in the amount of $6,550.00.

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due July 6, 1999. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due no later than July 23, 1999. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

Dated this 16th day of June, 1999.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY E. GISBRECHT, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 99-35496 D.C. No. CV-98-00437-JAR

BARBARA A. MILLER, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 99-35497 D.C. No. CV-96-06164-DCA

NANCY SANDINE, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant-Appellee.	No. 99-36038 D.C. No. CV-97-06197-JMS

DONALD L. ANDERSON, Plaintiff-Appellant, v. KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant-Appellee.	No. 99-36131 D.C. No. CV-96-06311-MRH ORDER (Filed April 20, 2001)

Before: HALL, RYMER, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and Graber have voted to deny the petition for rehearing en banc, and Judge Hall has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
Ralph Wilborn and Etta L. Wilborn, P.C.
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Eugene, Oregon 97401
Voice: (541) 485-4265
Fax: (541) 343-3601
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DONALD ANDERSON, Plaintiff, vs. **KENNETH S. APFEL,** Commissioner, Social Security Administration Defendant.	CV 96-6311-HO AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b).

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I represented Plaintiff during the federal court proceedings in this matter. I make this Affidavit in support of PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b). As a result of my representation of

Plaintiff in this matter, pursuant to JUDGMENT of this court, filed 1/5/98, the Commissioner's decision was reversed and remanded for further proceedings, and I won the case on remand, by ALJ decision dated 11/25/98.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer. As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon and the bars of the U.S. District Court for the State of Oregon and the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since 1994, apart from representing claimants in agency proceedings, I have represented numerous claimants before the U.S. District Court for the District of Oregon and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and in briefing. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

My current federal court contract provides for a fee of 25% of the claimant's past-due benefits. In *Crain v. Apfel*, Civ. No. 96-6326-HO and *Miller v. Apfel*, Civ. No. 97-6060-HO, the court approved an hourly rate of $150.00 for the undersigned's services. Previously, this court has awarded me fees at the rate of $175.00 per hour. See *Blair v. Chater*, Civ. No. 95-6135-HA, in which I asked for and received fees in the amount of $175.00 per hour, pursuant to 42 U.S.C. § 406(b). The Commissioner did not oppose the reasonableness of the award of fees in *Blair*. See also *Widrig v. Apfel*, ___ F.3d ___, 1998 WL 156526 (9th Cir. 1998) (upholding district court's finding that $175.00 per hour is a reasonable rate for my services).[1]

I am far more experienced in federal court litigation than I was at the time I wrote the *Blair* or *Widrig* briefs, and I believe a reasonable hourly rate for my federal court services is now at least $250.00, considering the prevailing rate in the Eugene, Medford, and Portland

---

[1] In *Widrig*, I had requested a lodestar of only $150.00 per hour, but the Commissioner argued, and the court found, that $175.00 per hour was a more reasonable hourly lodestar.

communities for similar services by lawyers of reasonably comparable skill, experience and reputation, considering the contingent nature of the representation, and considering my special expertise.

The attached Plaintiff's Schedule A is a printout of my law firm's contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto.

DATED this 15th day of July, 1999

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this day, July 15, 1999.

/s/ Amy Evenson
NOTARY PUBLIC FOR
OREGON

[SEAL] OFFICIAL SEAL
AMY EVENSON
NOTARY PUBLIC-OREGON
COMMISSION NO. 057310
MY COMMISSION EXPIRES SEPT. 3, 2000

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
Ralph Wilborn and Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
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Fax: (541) 343-3601
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

GARY GISBRECHT, Plaintiff, vs. **KENNETH S. APFEL**, Commissioner, Social Security Administration Defendant.	)	CV 98-437-RE AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b).

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I represented Plaintiff during the federal court proceedings in this matter. I make this Affidavit in support of PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b). As a result of my representation of

Plaintiff in this matter, pursuant to ORDER of this court, filed 10/16/98, the Commissioner's decision was reversed and remanded for payment of benefits, upon stipulation of the parties.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer. As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon and the bars of the U.S. District Court for the State of Oregon and the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since 1994, apart from representing claimants in agency proceedings, I have represented numerous claimants before the U.S. District Court for the District of Oregon and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and in briefing. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

I am aware of no Oregon attorneys, other than myself, Ralph Wilborn, and Kathryn Tassinari, who appeal to federal court Social Security cases where the claimant was unsuccessfully represented by another attorney during agency proceedings. This is attributable largely to the fact that federal court review of agency decisions has a dismal success rate. Such attorneys may exist, but if they do, they are scarce, and claimants who have such cases face substantial difficulties in finding federal court counsel in the local or other relevant market.

My current federal court contract provides for a fee of $250.00 per hour or 25% of the claimant's past-due benefits. Thus, my hourly rate currently is $250.00 per hour. Previously, this court has awarded me fees at the rate of $175.00 per hour. See *Blair v. Chater*, Civ. No. 95-6135-HA, in which I asked for and received fees in the amount of $175.00 per hour, pursuant to 42 U.S.C. § 406(b). The Commissioner did not oppose the reasonableness of the award of fees in *Blair*. See also *Widrig v. Apfel*, ___ F.3d ___, 1998 WL 156526 (9th Cir. 1998)

(upholding district court's finding that $175.00 per hour is a reasonable rate for my services).[1]

I am far more experienced in federal court litigation than I was at the time I wrote the *Blair* or *Widrig* briefs, and I believe a reasonable hourly rate for my federal court services is now at least $250.00, considering the prevailing rate in the Eugene, Medford, and Portland communities for similar services by lawyers of reasonably comparable skill, experience and reputation, considering the contingent nature of the representation, and considering my special expertise.

The attached Plaintiff's Schedule A is a printout of my law firm's contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto.

DATED this day, February 4, 1999.

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this day, February 4, 1999.

/s/ Amy Evenson
NOTARY PUBLIC FOR
OREGON

---

[1] In *Widrig*, I had requested a lodestar of only $150.00 per hour, but the Commissioner argued, and the court found, that $175.00 per hour was a more reasonable hourly lodestar.

[SEAL] OFFICIAL SEAL
AMY EVENSON
NOTARY PUBLIC-OREGON
COMMISISON NO. 057310
MY COMMISSION EXPIRES SEPT. 3, 2000

RALPH WILBORN, ATTORNEY AT LAW
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OSB # 84104
OSB # 94464
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA A. MILLER, Plaintiff, vs. **KENNETH S. APFEL,** Commissioner, Social Security Administration, Defendant.	)	C.V. 96-6164-AS AFFIDAVIT OF RALPH WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)(1).

STATE OF OREGON)
) ss
County of Lane)

I, Ralph Wilborn, being first duly sworn on oath depose and say as follows:

I am the attorney of record in the above-captioned matter. I represented Plaintiff during the federal court

proceedings in this matter. I make this Affidavit in support of Plaintiff's MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)(1). As a result of my representation in this matter, pursuant to Judgment filed October 7, 1997, the Commissioner's decision was reversed and remanded for payment of benefits.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

For approximately 14 years, I have specialized in Social Security law. I limit my law practice to representing Social Security claimants in agency and federal court proceedings. I represent *all* clients strictly on a contingent fee arrangement. I estimate that since 1990, approximately 90% of my practice has been devoted to **federal court** appeals of Social Security cases. I am the author of *Wilborn's Social Security Disability Advocate's Handbook: The Process Unification Rulings*, and the editor of *Wilborn's Selected Social Security Rulings: The Sequential Analysis of Disability*, published by James Publishing Company.

Because of my expertise in the area of Social Security disability law, in 1989, I was asked to, and did, provide, a 4-day Social Security disability training program to employees of the State of Oregon Supplemental Security Income (SSI) Liaison program. In 1991, I presented a CLE seminar on "SSI For The elderly" to Oregon attorneys in conjunction with the National Business Institutes' program, *Oregon Elder Law: The Basics and Beyond*. In March 1995, I provided a 3-day advanced Social Security disability law training program to employees of the State of Oregon SSI Liaison program. In November and December

1995, and February, 1996, I provided 2-day Social Security disability law training sessions to approximately 200 employees, including hearing officers, of the State of Oregon who implement the state's General Assistance, AFDC, and SSI Liaison programs. In May, 1997, I presented yet another 3-day Social Security disability law training program to employees of the State of Oregon SSI Liaison program.

I have been a frequent guest speaker/lecturer at Ninth Circuit Social Security conferences and at national conferences sponsored by the National Organization of Social Security Claimants' Representatives. Additionally, since 1987, upon invitation, I periodically have provided Social Security disability law seminars to support groups from such organizations as the Oregon Head Injured Foundation, Chronic Fatigue Immune Dysfunction Syndrome Society and the Multiple Sclerosis Society.

I was counsel of record in the following significant Social Security disability cases: *Pitzer v. Sullivan*, 908 F.2d 502 (9th Cir. 1990); *Morgan v. Sullivan*, 945 F.2d 1079 (9th Cir. 1991); *Rice v. Sullivan*, 947 F.2d 341 (9th Cir. 1991); *Allen v. Shalala*, 48 F.3d 456 (9th Cir. 1995); *Atkins v. Shalala*, 837 F.Supp. 318 (D.Or. 1993) *as modified by Atkins v. Chater*, 70 F.3d 529 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821 (9th Cir. 1996); *Gomez v. Chater*, 74 F.3d 967 (9th Cir. 1996); *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996); and *Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997), *rev'd sub nom. Forney v. Apfel*, ___ U.S. ___ (June 15, 1998).

Because of my expertise in Social Security disability law, I frequently am asked by attorneys throughout the United States for advice in particular Social Security

cases, which I am pleased to provide. Additionally, because of my expertise in this area, other attorneys who themselves practice and/or specialize in Social Security disability law routinely refer Social Security cases to me to pursue federal court appeals. I routinely successfully appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

It is a nearly universal practice that federal court appeals of Social Security matters are undertaken upon a contingent fee basis wherein the claimant agrees to pay his/her attorneys 25% of the claimant's retroactive benefits, upon approval by the court. My customary rate for federal court representation in Social Security matters mirrors this practice in that I represent claimants under a contingent fee contract for 25% of the claimant's past-due benefits, pending approval by the court.

Thus, the so-called "market rate" for such appeals is based on Social Security appeals "as a class." The "market rate" therefore, is not an hourly lodestar. The market rate is simply 25% of a given claimant's retroactive benefits.

The attached Plaintiff's Schedule A is a printout of my contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto. Except for the 3.5 hours

expended by Tim Wilborn on 10/31/97, the time records reflect my representation.

DATED this 10th day of August, 1998.

/s/ Ralph Wilborn
RALPH WILBORN, OSB #84104
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 10th day of August, 1998.

/s/ Etta L. Wilborn
NOTARY PUBLIC FOR OREGON

[SEAL]
OFFICAL SEAL
ETTA L. WILBORN
NOTARY PUBLIC - OREGON
COMMISSION NO. 055560
MY COMMISSION EXPIRES SEPT. 9, 2000

DATED this 10th day of August, 1998.

Respectfully submitted,

/s/ Ralph Wilborn
RALPH WILBORN
OSB # 84104
(541) 485-4265
Of Attorneys for Plaintiff

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
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Fax: (541) 343-3601
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BARBARA A. MILLER, Plaintiff,	)	C.V. 96-6164-AS
vs.	)	AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)
KENNETH S. APFEL, Commissioner of Social Security Defendant.	)	

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I make this Affidavit in support of Plaintiff's Motion For Approval of Attorneys Fees Pursuant To 42 U.S.C. § 406(b). Partially as a result of my efforts in this matter, pursuant to Judgment of this

court filed October 7, 1997, the final order of the Commissioner was reversed and this action was remanded to the Commissioner for the award of disability benefits. Accordingly, Plaintiff was successful in establishing her entitlement to Social Security disability insurance benefits.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda, with an emphasis on the latter. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer.

As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon, the bar of the United States District Court for the District of Oregon, and the bar of the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since becoming an attorney, apart from representing numerous claimants in agency proceedings, I have represented numerous claimants before this court and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and

in briefing before the courts. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

Very few Oregon attorneys appeal to federal court Social Security cases where the claimant was unsuccessfully represented by another attorney during agency proceedings. This is attributable largely to the fact that federal court review of agency decisions has a dismal success rate, which currently is 13%. Such attorneys may exist, but if they do, they are scarce, and claimants who have such cases face substantial difficulties in finding federal court counsel in the local or other relevant market.

It is a nearly universal practice that federal court appeals of Social Security matters are undertaken upon a contingency fee basis wherein the claimant agrees to pay his/her attorneys 25% of the claimant's retroactive benefits, upon approval by the court. My customary rate for federal court representation in Social Security matters mirrors this practice in that I represent claimants under a contingent fee contract for 25% of the claimant's past-due

benefits, pending approval by the court. (In some of my cases, my contract specifies that the federal court attorney's fee shall be the lesser of 25% of the past-due benefits or $200.00 per hour. Such a provision was not used in the contract herein.)

Thus, the "market rate" for federal court Social Security appeals is based on Social Security appeals "as a class." The "market rate" therefore is not an hourly lodestar. The market rate is simply 25% of a given claimant's retroactive benefits.

Plaintiff's Schedule A, attached to the Affidavit of Ralph Wilborn, herein, is a printout of our law firm's contemporaneous time records, in which is included an itemization of the 3.50 hours I expended in the federal court proceedings related hereto.

DATED this15th day of September, 1998.

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 15th day of September, 1998.

/s/ Etta L. Wilborn
NOTARY PUBLIC FOR
OREGON

[SEAL] OFFICIAL SEAL
ETTA L. WILBORN
NOTARY PUBLIC - OREGON
COMMISSION NO. 055560
MY COMMISSION EXPIRES SEPT. 9, 2000

RALPH WILBORN, ATTORNEY AT LAW, OSB #84104
TIM WILBORN, ATTORNEY AT LAW, OSB #94464
Ralph Wilborn and Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
Voice: (541) 485-4265
Fax: (541) 343-3601
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NANCY SANDINE, Plaintiff, vs. **KENNETH S. APFEL,** Commissioner, Social Security Administration, Defendant.	)	CV 97-6197-ST AFFIDAVIT OF TIM WILBORN IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b).

STATE OF OREGON)
) ss
County of Lane)

I, Tim Wilborn, being first duly sworn on oath depose and say as follows:

I am an associate attorney with the law firm of Ralph Wilborn and Etta L. Wilborn, P.C. I represented Plaintiff during the federal court proceedings in this matter. I make this Affidavit in support of PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b). As a result of my representation of

Plaintiff in this matter, pursuant to JUDGMENT of this court, filed 4/13/98, the Commissioner's decision was reversed and remanded for payment of benefits.

In support of my competence and expertise as a Social Security disability law practitioner, I submit the following:

I first began working with Social Security matters in 1991, as a law clerk for my current employers, attorneys who limit their law practice to Social Security disability law. I worked for this firm, in the capacity of law clerk, over a period of three years, researching and drafting both administrative and federal court memoranda. I graduated from the University of Oregon School of Law in June, 1994, and was admitted to the Oregon State Bar in September, 1994, at which time I became employed as an associate attorney with my current employer. As such, I have limited my law practice to representing Social Security claimants in agency and federal court proceedings. I am a member of the bar of the State of Oregon and the bars of the U.S. District Court for the State of Oregon and the U.S. Court of Appeals For The Ninth Circuit. I take *all* cases strictly on a contingent fee arrangement. Since 1994, apart from representing claimants in agency proceedings, I have represented numerous claimants before the U.S. District Court for the District of Oregon and before the U.S. Court of Appeals For The Ninth Circuit, both in oral argument and in briefing. I also have assisted in representing one Social Security claimant in proceedings before the U.S. Supreme Court.

Because of my expertise in Social Security disability law, I routinely appeal, in federal court, agency decisions denying benefits to claimants who have been represented by other attorneys who practice and/or specialize in Social Security disability law (as well as by those who do not) either upon referral to our firm by those attorneys or when those other attorneys have assessed the merits of the appeals and declined either to pursue a federal court appeal or to assist the claimant in procuring alternate legal representation.

I am aware of no Oregon attorneys, other than myself, Ralph Wilborn, and Kathryn Tassinari, who appeal to federal court Social Security cases where the claimant was unsuccessfully represented by another attorney during agency proceedings. This is attributable largely to the fact that federal court review of agency decisions has a dismal success rate. Such attorneys may exist, but if they do, they are scarce, and claimants who have such cases face substantial difficulties in finding federal court counsel in the local or other relevant market.

My current federal court contract provides for a fee of $250.00 per hour or 25% of the claimant's past-due benefits. Thus, my hourly rate currently is $250.00 per hour. Previously, this court has awarded me fees at the rate of $175.00 per hour. See *Blair v. Chater*, Civ. No. 95-6135-HA, in which I asked for and received fees in the amount of $175.00 per hour, pursuant to 42 U.S.C. § 406(b). The Commissioner did not oppose the reasonableness of the award of fees in *Blair*. See also *Widrig v. Apfel*, ___ F.3d ___, 1998 WL 156526 (9th Cir. 1998)

(upholding district court's finding that $175.00 per hour is a reasonable rate for my services).[1]

I am far more experienced in federal court litigation than I was at the time I wrote the *Blair* or *Widrig* briefs, and I believe a reasonable hourly rate for my federal court services is now at least $250.00, considering the prevailing rate in the Eugene, Medford, and Portland communities for similar services by lawyers of reasonably comparable skill, experience and reputation, considering the contingent nature of the representation, and considering my special expertise.

The attached Plaintiff's Schedule A is a printout of my law firm's contemporaneous time records in which I have set forth an itemization of the time expended in the federal court proceedings related hereto.

DATED this day, April 2, 1999.

/s/ Tim Wilborn
TIM WILBORN, OSB # 94464
(541) 485-4265
Of Attorneys for Plaintiff

---

[1] In *Widrig*, I had requested a lodestar of only $150.00 per hour, but the Commissioner argued, and the court found, that $175.00 per hour was a more reasonable hourly lodestar.

SUBSCRIBED AND SWORN to before me this day, April 2, 1999.

[SEAL] OFFICIAL SEAL
AMY EVENSON
NOTARY PUBLIC
OREGON
COMMISSION
NO. 057310
MY COMMISSION
EXPIRES
SEPT. 3, 2000

/s/ Amy Evenson
NOTARY PUBLIC FOR
OREGON

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170
Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Rosemary Kinney

EMPLOYMENT AGREEMENT
FEDERAL COURT SOCIAL SECURITY APPEALS

I, DON ANDERSON, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my

attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation**, all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of $245 to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS **CONTINGENT**

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement. My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

***IN WRITING WITHIN 24 HOURS* AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Donald L. Anderson
CLIENT'S SIGNATURE

544-36-7437
CLIENT'S SOCIAL SECURITY NUMBER

Dec. 9 1996
DATE

/s/ Ralph Wilborn
ATTORNEY AT LAW

/s/ Etta L. Wilborn
ATTORNEY AT LAW

/s/ Tim Wilborn
ATTORNEY AT LAW

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170 • Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Amy Evenson

EMPLOYMENT AGREEMENT

I, Gary Gisbrecht, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts, and if necessary, upon remand to the Social Security Administration. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify

further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation,** all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of $ 0 to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS **CONTINGENT**

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and/or the Social Security Administration, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement.

My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

IN WRITING WITHIN 24 HOURS **AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Gary Gisbrecht CLIENT'S SIGNATURE	/s/ Tim Wilborn- ATTORNEY AT LAW
531-60-4562 CLIENT'S SOCIAL SECURITY NUMBER	/s/ Ralph Wilborn ATTORNEY AT LAW
3/31/98 DATE	/s/ Etta L. Wilborn ATTORNEY AT LAW

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170 • Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Melanie Burkhouse

EMPLOYMENT AGREEMENT – FEDERAL COURT SOCIAL SECURITY APPEALS

I, Barbara Miller, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my

attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation,** all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of **$75.00** to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS CONTINGENT

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement. My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

***IN WRITING WITHIN 24 HOURS* AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Barbara A. Miller
CLIENT'S SIGNATURE

CLIENT'S SOCIAL SECURITY NUMBER

June 16, 1996
DATE

/s/ Ralph Wilborn
ATTORNEY AT LAW

/s/ Etta L. Wilborn
ATTORNEY AT LAW

/s/ Tim Wilborn
ATTORNEY AT LAW

RALPH WILBORN & ETTA L. WILBORN, P.C.
ATTORNEYS AT LAW
1580 Valley River Drive, Suite 170 • Eugene, OR 97401
Telephone: (541) 485-4265 Fax: (541) 343-3601

Ralph Wilborn
Etta L. Wilborn
Tim Wilborn

Legal Assistant
Rosemary Kinney

EMPLOYMENT AGREEMENT – FEDERAL COURT SOCIAL SECURITY APPEALS

I, Nancy Sandine, hereby employ the law firm of RALPH WILBORN and ETTA L. WILBORN, P.C., Attorneys at Law, to represent me in my Social Security disability claim before the United States federal courts. I understand that my attorneys have not promised to win my case but have promised to do their best to help me.

I will inform my attorneys if I have a change of address or medical condition; if I work or file another claim; or if there are other circumstances which affect my claim.

My attorneys are authorized to file documents, sign my name, and act for me in all respects. I agree that another representative including a non-attorney may be employed at the discretion and expense of my attorneys, and that any person so employed may be designated to appear on my behalf or to assist in my representation in this matter.

I agree that my attorneys may withdraw from this case at any time if they believe my claim does not justify further steps or there will be insufficient funds or security for payment of the attorneys fee. I also agree that my

attorneys may withdraw from this case if, at any time, I fail to cooperate with them in their representation.

I AGREE TO PAY ALL NECESSARY EXPENSES WITHOUT REGARD TO THE OUTCOME OF THIS CASE

I agree to pay, **even if my attorneys are not successful in this representation,** all necessary expenses, including, but not limited to: the cost of doctors' reports, hospital and clinic records, long distance telephone charges; travel expenses; regular, certified, or other postage charges; charges for photocopies, medical tests, court case filing fees; and all other out-of-pocket expenses directly incurred in investigating or representing this claim. I understand such expense [sic] are separate from attorneys fees.

EXPENSE DEPOSIT

I agree to give my attorneys an expense deposit of $240.00 to hold in their lawyer's trust account and to draw upon as expenses are incurred. I will give them additional deposits as necessary to maintain the expense deposit at the above level. At the end of my case, my attorneys will refund me the balance of any expense deposit which remains after payment of all charges owed.

PAYMENT OF ATTORNEYS FEES IS CONTINGENT

This agreement is contingent upon a finding of disability by the Social Security Administration or the federal court.

ATTORNEYS FEES

If my attorneys are successful in this representation, as payment for their services, I agree to pay them the following:

(1) **TWENTY FIVE PERCENT** (25%) of the past due benefits recovered for me and all members of my family, no matter when or where recovered.

I understand that my attorneys will apply for their fees to the federal court, and I agree to help them obtain approval for the full amount of the fee set forth in this agreement. My attorneys are authorized to apply for additional fees and expenses to be paid under the Equal Access to Justice Act by the government and not by me, but I will be entitled to have the smaller fee if they are awarded **two fees for the same services**.

I authorize my attorneys to apply for fees in such a manner as to maximize the fee paid to my attorneys, even though it may eliminate or decrease a fee refund under the Equal Access to Justice Act to which I might have been otherwise entitled.

ATTORNEYS FEES WITHHELD BY THE SOCIAL SECURITY ADMINISTRATION

I understand that the Social Security Administration *may* withhold the sum of 25% of any past-due benefits owed to me for payment of attorneys fees. *If for any reason, the full amount approved for attorneys fees is not withheld by the Social Security Administration, I understand that it is my obligation to pay the above agreed fee directly to my attorneys.*

If I receive *any* payment of back benefits in a lump sum check, upon receipt of the benefit check, I agree immediately to pay to my attorneys, for deposit into the lawyer's trust account, twenty-five percent (25%) of my lump sum benefit check. I agree to do this *even if* I am notified that the Social Security Administration has already withheld attorneys fees from my retroactive benefits.

My attorneys will retain this sum in the lawyer's trust account until they obtain authorization to charge and receive a fee, at which time they may withdraw so much of the sum as has been authorized for their fees. My attorneys will promptly return to me the excess, if any, beyond the authorized fee and costs incurred.

I UNDERSTAND THAT I MAY CANCEL THIS CONTINGENT FEE AGREEMENT BY NOTIFYING MY ATTORNEY AT:

RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 VALLEY RIVER DRIVE, SUITE 170
EUGENE, OREGON 97401

***IN WRITING WITHIN 24 HOURS* AFTER I HAVE SIGNED THIS AGREEMENT, OR BY THE SAME TIME THE NEXT WORKING DAY.**

I have either read this agreement or had it explained to me before I have signed it, and I have received a copy of it.

/s/ Nancy V. Sandine
CLIENT'S SIGNATURE

/s/ Ralph Wilborn
ATTORNEY AT LAW

544-40-6370
CLIENT'S SOCIAL SECURITY NUMBER

/s/ Tim Wilborn
ATTORNEY AT LAW

7/29/97
DATE

/s/ Etta Wilborn
ATTORNEY AT LAW

PETER S. YOUNG
Attorney at Law
California State Bar No. 60219

271 Miller Avenue
Mill Valley, CA 94941-2862
(415) 388-2400

AFFIDAVIT OF PETER S. YOUNG

STATE OF CALIFORNIA,)
) ss
County of Marin)

I Peter S. Young, Attorney at Law, being duly sworn on oath depose and say as follows:

I am an attorney with 16 years of experience in the field of Social Security Disability representation, practicing before the three agency hearing offices serving residents of the San Francisco Bay Area. I also consult with the local Social Security bar regularly, in my capacity as the editor of "Social Security Advisory Service," an information service for advanced Social Security practitioners. I am the designated consultant in my geographic area for attorney fee issues raised by members of the National Organization of Social Security Claimants' Representatives. I have testified as an expert witness on Social Security attorney fee issues in proceedings of the California State Bar Court.

Based on the foregoing, I am very familiar with the general practices of attorneys in this region as to attorney fees typically charged for representing Social Security Disability claimants.

I make this affidavit for the purpose of stating the following regarding my knowledge of the market rate for attorney fees among Social Security Disability attorneys:

To the best of my knowledge, Social Security Disability attorneys nearly always use fee contracts which provide for a contingent attorney fee equalling 25% (twenty five percent) of the claimant's retroactive benefits. Few, if any, attorneys use contracts which provide for an hourly rate. For representation during proceedings before the Social Security Administration, most attorney fee contracts specify that the maximum fee is a set dollar amount that is typically $4,000.00. Even with this upper fee limit, the typical recovery based on time expended for a successful case averages substantially above $250.00 per hour.

Contingent fee contracts for representation before the federal courts (including the contract used in my own office) normally do not contain a maximum dollar amount fee limit, and the market rate for federal court representation is simply 25% (twenty five percent) of the claimant's retroactive benefit recovery.

DATED this 13th day of May, 1998.

/s/ Peter S. Young
Peter S. Young Attorney at Law

SUBSCRIBED AND SWORN TO before me this 13th day of MAY, 1998.

[SEAL] ROBERT J. BEGLEY
COMM. # 1073153
NOTARY PUBLIC-CALIFORNIA
Marin County
My Comm. Expires Sept. 28, 1999

/s/ Robert Begley
NOTARY PUBLIC

AFFIDAVIT OF BRUCE BREWER

STATE OF WASHINGTON)
) ss
County of Thurston)

I, Bruce Brewer, Attorney at Law, being duly sworn on oath depose and say as follows:

I am an attorney with several years of experience in the field of Social Security Disability claimants' representation, having practiced in law office in the Eugene, Oregon, Portland, Oregon, and Olympia, Washington areas. I am familiar with the general practices of attorneys in these cities, as regards attorney fees typically charged for representing Social Security Disability claimants.

I make this affidavit for the purpose of stating the following regarding my knowledge of the market rate for attorney fees among Social Security Disability attorneys:

To the best of my knowledge, Social Security Disability attorneys virtually always use contracts which provide that the attorneys' fees will be 25% (twenty-five percent) of the claimant's retroactive benefits. Few, if any, attorneys use contracts which provide for an hourly rate. For representation during proceedings before the Social Security Administration, many attorneys' contracts specify that the maximum fee is a set dollar amount (typically $4,000.00), but often, even with this limit, the fee charged for administrative representation would be substantially higher than $250.00 per hour if viewed in terms of an hourly rate. Contracts for representation before the federal courts (including the contract used by all the attorneys in my own office) often do not contain such a

maximum dollar amount fee limit, and the market rate for federal court representation is simply 25% (twenty-five percent) of the retroactive benefits.

DATED this 12 day of May, 1998.

/s/ Bruce Brewer
Bruce Brewer, Attorney at Law

SUBSCRIBED AND SWORN TO before me this 12 day of May, 1998.

/s/ Elie Halpern
NOTARY PUBLIC

[SEAL] OFFICIAL SEAL
ELIE HALPERN
Notary Public – State of Washington
My Commission Expires 12-9-99

Declaration of Attorney Eric Schnaufer
Pursuant to 28 U.S.C. § 1746

1. For several years I have represented claimants for Social Security Disability Insurance Benefits.

2. For several years I have been an independent contractor for and consultant to attorneys who represent claimants for Social Security Disability Insurance Benefits.

3. I am familiar with attorney fee agreements attorneys make with claimants for Social Security Disability Insurance Benefits; the statements in this declaration are based on the best of my knowledge; and the statements in this declaration concern attorney fee agreements relevant to section 206(b) of the Social Security act, 42 U.S.C. § 406(b), and do not address the relationship between 42

U.S.C. § 406(b) and Equal Access to Justice Act, 28 U.S.C. § 2412(d).

4. Attorney fee agreements with claimants for Social Security Disability Insurance Benefits are similar in all judicial circuits and geographic regions.

5. Attorney fee agreements for legal services for claimants for Social Security Disability Insurance Benefits almost always specify that the attorney fees will be twenty-five percent of past due benefits payable.

6. It is extraordinarily rare for an attorney fee agreement for legal services for a claimant for Social Security Disability Insurance Benefits to specify an hourly rate.

7. Attorney fee agreements for legal services for plaintiffs for Social Security Disability Insurance Benefits almost always specify that the attorney fees will be twenty-five percent of past due benefits payable.

8. There is no true "market" rate for attorney fees for plaintiffs for Social Security Disability Benefits because there is a statutory maximum on the amount of attorney fees a court may award and because almost all attorney fee agreements for legal services for plaintiffs for Social Security Disability Insurance Benefits specify that attorney fees will be the statutory maximum fees, i.e., twenty-five percent of past due benefits payable.

9. The market rate for attorney fees for plaintiffs for Social Security Disability Benefits is thus the statutory maximum fee.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 18, 1998.

/s/ Eric Schnaufer
Eric Schnaufer
Attorney at Law
Illinois A.R.D.C. No. 06206051
2501 N. Lincoln Ave. #285
Chicago, IL 60614
(773) 935-4016

OREGON STATE BAR
1998 ECONOMIC SURVEY

October 1998

Prepared by

FLIKIRS PROFESSIONAL SERVICES, INC.
P.O. Box 817
Portland, OR 97207
503-248-4679
flikirs@worldnet.att.net

Plaintiff's Exhibit E - Page 2

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 406(b)

Hours Billed by Method of Pay: Hours billed per month are presented in the following table by method of pay for attorneys in private practice working full-time or part-time by choice. The overall median number of hours for employees was 139 while the Portland region was highest with 145 hours per month. Owner overall median number of hours was 110 and 130 for the Portland region. This data was not collected in the 1994 survey.

Hours Billed Per Month by Method of Pay- Private Practice									
Method of Pay		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Owner (e.g., Partner, Shareholder, Sole Practitioner)	Average	103	120	80	100	97	100	97	80
	Median	110	130	80	100	110	100	100	80
Employee (e.g., salaried or hourly paid)	Average	124	135	112	117	111	90	113	81
	Median	139	145	120	115	120	100	120	64
Contract (e.g., paid by hour or assignment)	Average	80	82	89	65	n/a	n/a	n/a	n/a
	Median	88	83	100	74	n/a	n/a	n/a	n/a

Billing Rate: The low, average, median, and high hourly billing rates are included in the following table. This data and subsequent tables regarding billing rates includes attorneys in private practice working full-time, part-time by choice, or part-time due to lack of legal work. The overall average and median billing rates of $138 and $130 per hour compare to $123 and $120 in the 1994 survey.

Hourly Billing Rate Overall - Private Practice								
Hourly Billing Rate	Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Low	15	25	15	30	25	80	50	90
Average	138	155	128	121	130	125	120	121
Median	130	150	125	125	125	125	125	125
High	365	300	365	195	240	250	160	175

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Total Years Admitted to Practice: Average and median hourly billing rates by total years admitted to practice are presented in the following table. Overall average and median billing rates were generally higher with the more years admitted to practice. Regional data exhibits some variations, but generally follows the trend of higher rates as years of experience increase.

Hourly Billing Rate by Total Years Admitted to Practice - Private Practice									
Years Admitted		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
0-3 Years	Average	100	104	89	104	103	96	105	108
	Median	100	105	100	100	100	95	100	100
4-6 Years	Average	114	120	123	104	94	103	109	107
	Median	115	125	120	100	100	100	108	100
7-9 Years	Average	122	141	116	109	113	108	115	111
	Median	125	140	125	120	125	105	120	120
10-12 Years	Average	135	145	131	110	119	127	130	n/a
	Median	128	150	125	105	125	125	140	n/a
13-15 Years	Average	141	155	132	134	128	111	126	115
	Median	140	150	135	138	139	110	130	118
16-20 Years	Average	148	170	127	129	143	122	125	121
	Median	145	175	125	140	150	125	135	125
21-30 Years	Average	157	178	148	140	145	139	130	133
	Median	150	180	150	143	150	135	125	125
Over 30 Years	Average	163	181	164	134	150	142	118	129
	Median	150	175	140	125	150	140	125	125

Hourly Billing Rate by Area of Private Practice									
Area of Private Practice		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Family Law	Average	126	144	125	126	122	110	113	124
	Median	125	150	125	125	125	100	110	125
Real Estate/Land Use	Average	147	167	132	111	153	127	129	108
	Median	143	170	128	105	150	120	129	100
Tax/Estate Planning	Average	150	168	139	129	150	137	135	116
	Median	150	165	140	125	150	143	143	120
Workers' Compensation	Average	133	133	136	115	154	123	n/a	n/a
	Median	125	123	125	113	150	120	n/a	n/a
General (no area over 50%)	Average	127	146	119	118	125	128	118	122
	Median	125	143	120	120	125	130	125	125
Other	Average	155	169	142	125	145	107	n/a	n/a
	Median	150	175	135	120	150	110	n/a	n/a

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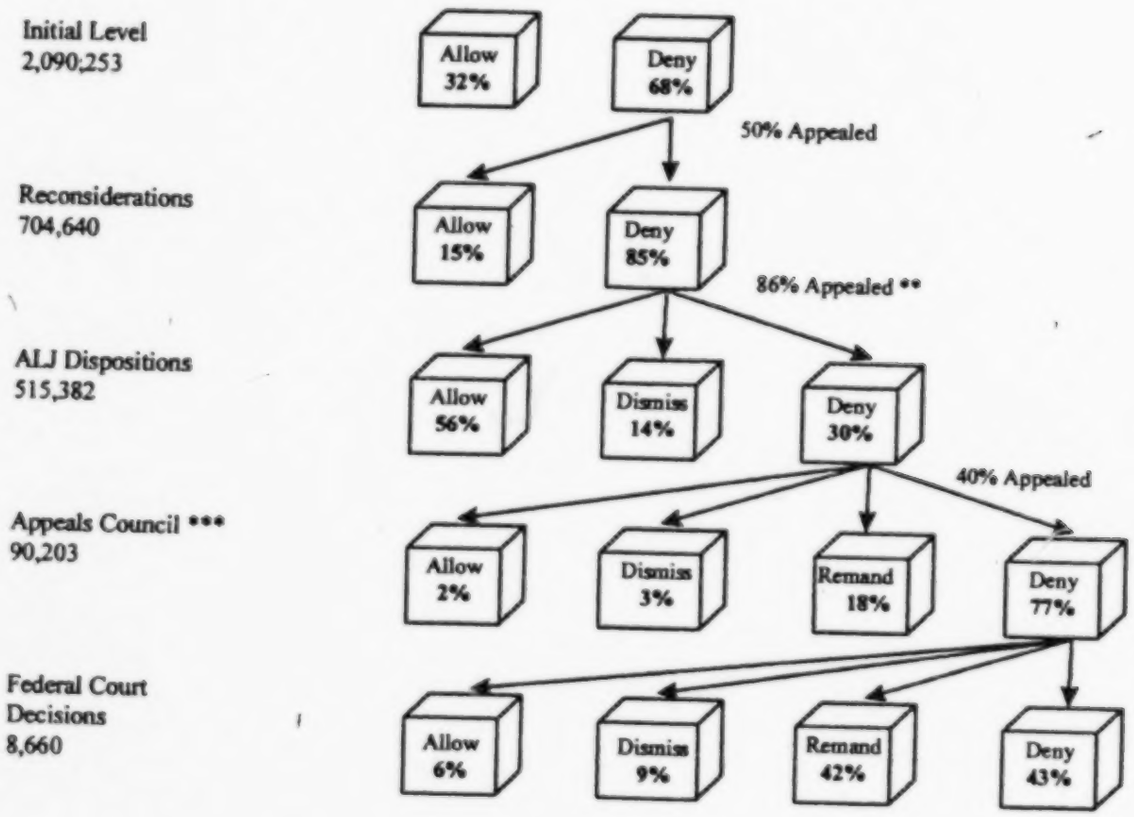
Billing Methods: Data for percentage of time and income was collected for various types of billing methods. Hourly billing remains the principal method of billing with the percentage of time increasing from 68% in 1994 to 70% and the percentage of income increasing from 66% to 69%. Contingency billing decreased slightly from the 1994 survey and flat rate billing remained relatively stable. The average percentage of time spent for a particular billing method continues to closely relate to the average percentage of income derived from that billing method.

Average Percentage of Time and Income by Billing Method - Private Practice

Billing Method		Oregon	Portland	Tri-County	Upper Valley	Lower Valley	Southern Oregon	Eastern Oregon	Oregon Coast
Hourly Billing	% Time	70%	75%	66%	68%	67%	65%	71%	62%
	% Income	69%	74%	65%	64%	68%	59%	70%	64%
Contingency	% Time	15%	15%	14%	16%	18%	17%	10%	14%
	% Income	16%	17%	13%	20%	17%	19%	10%	13%
Flat Rate	% Time	11%	7%	17%	12%	12%	16%	16%	14%
	% Income	12%	7%	18%	13%	11%	20%	16%	17%
Value Billing	% Time	2%	2%	2%	2%	2%	1%	2%	2%
	% Income	2%	2%	2%	2%	1%	2%	2%	3%
Other	% Time	1%	1%	1%	1%	2%	0%	1%	8%
	% Income	1%	1%	2%	1%	3%	0%	2%	3%

DI AND SSI DISABILITY DETERMINATIONS AND APPEALS
Fiscal Year 1997*



% of Total Allowances	
Total	100.0
Initial Applications	62.8
Reconsiderations	9.9
ALJs	27.1
Appeals Council	.1
Federal Court	.05

* The data relate to workloads processed (but not necessarily received) in fiscal year 1997, i.e. the cases processed at each adjudicative level may include cases received at 1 or more of the lower adjudicative levels prior to FY 1997. The data include determinations on initial applications only.

** Many ALJ dispositions, Appeals Council and Federal court decisions are based on DDS determinations from a previous year. Appeal rates from reconsideration to ALJ for applications are historically about 65 percent. Due to declining reconsideration workloads and agency initiatives to reduce ALJ backlogs in FY 1997, computation of reconsideration denials and ALJ dispositions yields an inflated 86 percent appeal rate for initial claims. Dismissals as well as denials are appealed.

*** Includes ALJ decisions not appealed further by the claimant but reviewed by the Appeals Council on "own motion" authority.

Source: Social Security Administration, 1998.